TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 376

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER,

vs.

JERRY LESTER.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 31, 1960.
CERTIORARI GRANTED NOVEMBER 14, 1960.

Supreme Court of the United States

OCTOBER TERM, 1960

No. 376

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER,

vs.

JERRY LESTER.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BEFORE THE TAX COURT OF THE UNITED STATES

[fol. A] Filed Dec. 17, 1959.

Docket No. 67540

JERRY LESTER, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

APPEARANCES:

For Petitioner: Louis Mandel, Esq.
Leonard J. Lefkort, Esq.

For Respondent:

DOCKET ENTRIES

1957

May 28—Petition received and filed. Taxpayer notified. Fee paid.
June 10—Copy of petition served on General Counsel.
May 28—Request for Circuit hearing in N.Y., N.Y. filed by Petr. Granted 6/10/57. Served 6/11/57.
May 28—Entry of appearance of Louis Mandel as counsel filed. Served 6/10/57.
June 27—Answer filed by Resp. Served Jun 28 1957.

1959

Feb 2—Notice of trial at New York, N.Y. Apr. 20, 1959. Served 2/2/59.
Apr 23—Order that case is continued to May 18, 1959, New York, N.Y. Served May 1, 1959.
Apr 30—Notice of trial May 18, 1959, New York. Served May 1, 1959.
May 19—Trial at New York by J. Murdock. Appearance of Leonard J. Lefkort, Esq. filed. Orig. briefs due July 3, 1959. Replies due July 23, 1959.

1959

June 4—Transcript of proceedings of May 18, 19, 1959. (1).
July 3—Orig. brief filed by petr. Served 7/30/59.
July 6—Motion by resp. for extension of time to August 3, 1959 to file brief. Gr. 7/10/59. S. 7/13/59.
July 27—Orig. brief filed by resp. Served 7/30/59.
Aug 17—Reply brief filed by petr. Served 8/26/59.
Sept 9—Findings of Fact and Opinion, Judge Murdock. Decision will be entered for the Commissioner. Served 9/9/59.
Sept 11—Decision entered, Judge Murdock. Served 9/14/59.
Nov 10—Petition for review by U.S. Ct. of Ap. 2nd Cir. filed by petr.
Nov 10—Proof of service filed.

[fol. 1] BEFORE THE TAX COURT
OF THE UNITED STATES

Docket No. 67540

JERRY LESTER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

EXCERPTS FROM PROCEEDINGS OF MAY 18 AND 19, 1959

Room 5050,
Grand Central Terminal Building,
70 East 45th Street,
New York, New York,

Met, pursuant to notice, at 10 o'clock a.m.

BEFORE:

HON. J. EDGAR MURDOCK, Judge.

APPEARANCES:

LOUIS MANDEL, and L. J. LEFKORT,	1501 Broadway, New York, New York, appearing for Petitioner.
JOHN A. DUNKEL, ESQ.,	90 Church Street, New York 7, New York, appearing for the Respondent.

[fols. 2-16] • • •

• • • •

[fol. 17] LOUIS MANDEL

was called as a witness on behalf of Petitioner and, after being first duly sworn, was examined and testified as follows:

• • • •

[fols. 18-24] • • •

[fol. 25] CROSS EXAMINATION

• • • • •

[fol. 26] Q Were the children residing with her during those years?

A I don't know. I know certain parts of the year [fol. 27] they were not residing with her, they were residing with their father.

• • • •

[fol. 28] • • •

[fol. 29] THE COURT: Well, this isn't like an affidavit. This is an agreement between two people and it has material bearing upon the case that is before us and those two people have signed it and they are obviously or it seems obvious that they were dealing at arm's length and that their interests were different and I wouldn't think there would be any reason to doubt the fact that they were married or that they had children when they agreed they had, and the agreement pertains to what they are going to do about the situation because the husband and wife are now separating or they have and they are going to make some payments to each other.

• • • • •

[fol. 30] THE COURT: Are there any statements that state the division of the total funds between wife and children?

MR. DUNKEL: Paragraph 11.

THE COURT: Husband agrees to pay the wife for the support and maintenance for herself and the children—and so forth, I am not reading it entirely. Upon what do you rely to break down the total between alimony and child support?

MR. DUNKEL: Page 20, Paragraph I.

THE COURT: That is, if one of the children should marry, become emancipated or die while this agreement is still in effect, then the payments herein certified shall, on the happening of each such event, be reduced in a sum equal to one-sixth of the payment which would thereafter [fol. 31] otherwise accrue and be payable in accordance with the terms and provisions here of. you claim on the basis of that, one-half of this was payable to the children, is that your point?

MR. DUNKEL: Yes, Your Honor.

MR. MANDEL: Our point, right in the same paragraph that you had, which is the sense of the whole agreement, is that all payments herein specified shall cease upon the death of the husband or the wife or upon the remarriage of the wife, it all ceases. All the cases hold—

THE COURT: I am familiar. Your point is since the whole thing was to rest on something happening to the wife—

MR. MANDEL: Or "remarriage."

THE COURT: Well, that would be something happening. She could die or remarry, I was trying to cover them both with one word; since the whole thing is to stop under those circumstances, it is an indication that so long as the thing continued as it started, there was no means of dividing between wife and children the total amount to be paid.

MR. MANDEL: My argument is still further if you are going to use the rules of law to divide which they used to use: What was left after the wife remarried. They generally went along with the old cases, calling for the support of the children. Using that equation, what was left if this wife remarried—nothing. Therefore nothing [fol. 32] was for the support of the children.

THE COURT: You read the whole thing together and you find out if there was any justification for a separation during the taxable years of the total sum in alimony and child support.

MR. MANDEL: Right.

THE COURT: You look at it and you say for the reasons you outlined, you can't divide it. He says if one of the children should die or the wife should remarry, he is relying upon that to support his argument that one-half is really not alimony at all but is for the support of children.

MR. MANDEL: That is correct. I don't mean to interrupt. It is just my nervous system.

THE COURT: It is a little odd in the whole thing as to why—suppose his wife had died a day or so afterwards, then I suppose his theory was that he would take care of the children?

MR. MANDEL: Right. I have one other point, the whole agreement—as I say, I am talking from my side and the people who drew it. I will point to another paragraph which indicates this was the intention—further on, as we go on with the agreement it provides in one of the paragraphs, and my associate will get it, that she is to receive so much money, so she is left with 15,600 a year after the payment of taxes. Now $15,600 a year after the payment of taxes is in another paragraph in later [fol. 33] years. If he were to pay taxes on that money, that paragraph wouldn't read that way.

THE COURT: Well, I can understand that. It is what they intended all right. But we still would have the problem as to what the Internal Revenue Code provides.

MR. MANDEL: It is 11(d), Your Honor, if you care to look at it.

• • • • •

(Whereupon, at 10:35 o'clock a.m., the hearing in the above-entitled matter was closed.)

[fols. 34-48] • • •

[fol. 49] PETITIONER'S EXHIBIT NO. 1

EXCERPTS FROM PROPERTY SETTLEMENT AGREEMENT

BETWEEN

ARDELL LESTER, WIFE

and

JERRY LESTER, HUSBAND

Dated: April 16th, 1951

[fols. 50-55] • • •

• • • • •

[fol. 56] 8. The wife does hereby assign, transfer and convey to the hsband all of her right, title and interest in and to the following property, and it is hereby agreed that henceforth all of the following property shall be the sole and separate property of the husband:

• • • • •

[fol. 57] (e) Life insurance policies identified as follows, and all having been issued by the New York Life Insurance Company:

Policy #17871908 in the sum of $25,000
Policy #18014196 in the sum of $25,000
[fol. 58] Policy #18014197 in the sum of $25,000

The foregoing policies are subject, however, to the following terms and conditions:

i) So long as the husband is required to pay the wife the sums and amounts set forth in Article 11 hereof, but in no event later than January 1, 1954, he will cause the wife to be named and designated as the sole and irrevocable beneficiary to the extent of $20,000 of the proceeds which might be payable pursuant to said policies, or any of them.

ii) So long as the husband is required pursuant to the terms and provisions of this agreement or by

law, to maintain and support all of the children of the parties, he will cause all of the children to be jointly named as the sole and irrevocable beneficiaries to the extent of $30,000 of the proceeds which might be payable pursuant to said policies, or any of them. In the event that the said obligation of the husband shall cease or terminate as to any of said children, said child may be withdrawn as such designated beneficiary, although the obligation herein set forth shall continue with respect to the other children.

[fols. 59-71] * * *

[fol. 72] 16. This agreement is entered into in the State of California, and shall be construed and interpreted under and in accordance with the laws of the State of California.

[fols. 73-154] * * *

[fol. 155] 32 T. C. No. 108

BEFORE THE TAX COURT OF THE UNITED STATES

JERRY LESTER, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Docket No. 67540. Filed September 9, 1959.

85

ALIMONY - DEDUCTION ; CHILD SUPPORT - SECTIONS 23(u) AND 22(k). - Periodic payments made by a divorced husband to his wife not only for her support and maintenance but specifically to include support and maintenance of their three minor children, held not deductible by the husband to the extent that the agreement and decree indicated that they were for the support and maintenance of the minor children.

FINDINGS OF FACT AND OPINION—SEPT. 9, 1959

Louis Mandel, Esq., and *Leonard J. Lefkort, Esq.*, for the petitioner.

John A. Dunkel, Esq., for the respondent.

The Commissioner determined deficiencies in income tax of $7,572.39 for 1951 and $13,761.72 for 1952. The sole issue is whether the Commissioner was correct in determining that a part of payments made by the petitioner to his former wife were for the support of their [fol. 156] children and not deductible under Section 23 (u) of the Internal Revenue Code of 1939.

FINDINGS OF FACT

The petitioner, herein called Jerry, filed his income tax returns for 1951 and 1952 with the district director, Upper Manhattan, New York.

Jerry and his wife, Ardell, entered into a "Property Settlement Agreement" on April 16, 1951. The agree-

ment recited that they were married on August 24, 1934, in Los Angeles, California; they had three children, Judy age 13, Joan age 11 and Jay age 9; and Jerry and Ardell were separated and living apart.

Paragraph (d) of the agreement was as follows:

> (d) The parties desire by this agreement to settle for all times their respective property rights, interests, duties and obligations with respect to each other, and to arrange by agreement for the making of periodic payments to the wife as and for the maintenance and support for her and the aforesaid children of the parties, in discharge of the husband's legal obligations arising out of, or in connection with the marital and family relationship between the parties, whether or not a divorce or decree of separation may hereafter be granted in favor of either of the parties hereto against the other.

The agreement recited that a suit for separate maintenance by Ardell was pending against Jerry in the Superior Court of the State of California.

It was agreed "that the welfare and best interests of the minor children of the parties hereto are of paramount concern and interest to the parties," both the husband and wife were fit and proper persons to "have the care, custody and control of the children" but such care, custody and control would be given to the wife, subject to the petitioner's reasonable right of visitation and the right to have the children stay with him for 30 days during the summer vacation.

Paragraph 11 of the agreement is, in part, as follows:

[fol. 157] 11. The husband agrees to pay the wife for the support and maintenance of herself and the children of the parties, namely, JUDY LESTER, JOAN LESTER and JAY LESTER, the following amounts commencing with the effective date of this agreement (as said term is hereinafter defined in subdivision (j) of this Article 11):

> (a) For the period ending December 31, 1951, a sum equal to 50% of the husband's gross income

commencing with the effective date of this agreement, but not in excess of a total sum of $50,000.

(b) For the calendar year immediately following the period set forth in subdivision (a) hereof, a sum equal to 25% of the husband's annual gross income during said period of one year, but not in excess of a total sum of $45,000.

(c) For the calendar year immediately following the period set forth in subdivision (b) hereof, a sum equal to 25% of the husband's annual gross income during said period of one year, but not in excess of a total sum of $45,000.

(d) For each year immediately following the period set forth in subdivision (c) hereof, a sum equal to 20% of the hsuband's annual gross income during each such year, but not in excess of that sum each year which, after the payment of all income taxes assessable upon the wife with respect to the amounts thus paid to the wife shall equal $15,600.

• • • •

(f) In addition to the payments above provided the husband agrees to pay for any extraordinary and unusual medical and dental expenses and fees incurred with respect to any of the children of the parties so long as they are minors and are not emancipated.

• • • •

(i) All payments herein specified shall cease upon the death of the husband or the wife or upon the remarriage of the wife, whichever shall first occur. It is expressly agreed that the wife shall not have any claim against the estate of the husband, should he predecease her, for any sums payable hereunder, except such sums as may have been due and payable to her pursuant to the terms hereof prior to his death. In the event that any of the children of the parties hereto shall marry, become emancipated, or die, then the payments herein specified shall on the happening of each such event be reduced in a sum equal to one-sixth of the payments which would

thereafter otherwise accrue and be payable in accordance with the terms and provisions hereof.

* * * *

[fol. 158] A California court on April 27, 1951, entered an interlocutory judgment of divorce between Jerry and Ardell, which ratified, confirmed and approved the agreement of April 16, 1951, and set forth the substance of the provisions of the above-quoted paragraph 11. It ordered the petitioner to commence making the payments provided in the agreement one day after the entry of the decree. It also provided that the petitioner and Ardell were to remain husband and wife until the entry of the final judgment of divorce one year after the entry of the interlocutory judgment. A final judgment of divorce was entered November 5, 1952, in the action in the California court. The petitioner made periodic payments totaling $23,000 in 1951 and $39,000 in 1952, pursuant to the agreement of April 16, 1951. Ardell resided in California during 1951 and 1952.

Jerry deducted the full amounts of the payments for each year. The Commissioner in determining the deficiency for each year disallowed one-half of each deduction and explained:

> It is held that $11,500.00 of the $23,000.00 claimed as alimony payments for the taxable year 1951 and $19,750.00 of the $39,500.00 claimed as alimony payments for the taxable year 1952 do not constitute deductions allowable under the provisions of Section 23(u) of the 1939 Internal Revenue Code and the corresponding sections of the regulations.

Opinion.

Murdock, *Judge:* The issue for decision is whether Jerry is entitled to a deduction under section 23(u) but the answer must be sought in section 22(k) of the Internal Revenue Code of 1939. Section 23(u), as applicable to the taxable years 1951 and 1952, provides that a husband may deduct amounts which are includible in the income of his wife under section 22(k) if paid within his taxable

year. Section 22(k), as applicable to the taxable years, [fol. 159] provides in so far as material hereto, that a wife who is divorced from her husband under a decree of divorce shall include in her gross income periodic payments received subsequent to such decree in discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce. It further provides that the subsection shall not apply "to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband."

The intention of Congress in enacting these provisions was to allow the husband to deduct alimony payments and to require the wife to report alimony payments as income. Congress did not intend to allow the husband deductions for amounts supplied by him to be expended in support of his minor children. Section 24(a)(1) expressly provides that no deduction shall be allowed in any case in respect of "Personal, living, or family expenses, except extraordinary medical expenses deductible under section 23(x)." The obligation to support his minor children is imposed upon the husband by law and cannot be escaped by him through any agreement with his wife, whether incident to divorce or otherwise. However, Congress provided that the part of any periodic payment made by a husband to the wife which would not be taxable to the wife would only be such "part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband." If it is clear from [fol. 160] the terms of the decree or written instrument that some part of the total payments to the wife is intended to be used for the support of the children, then it seems only proper to examine the instrument as a whole in an effort to determine whether it can be fairly said that an amount of money or a portion of the payment is fixed therein as a sum which is payable for the support of the minor children.

Payments made by a husband to his divorced wife, to the extent that they are to be used to discharge his obligation to support their minor children, do not represent earnings of the wife or profit of any kind to her and are not her income in any true sense. The Tax Court, with these thoughts in mind, has felt that payments, made by the husband to the mother of his children, which are obviously intended to include both alimony for the wife and support for the minor child or children should not be regarded as entirely alimony for the purpose of section 22(k), if the terms of the agreement or decree contain a reasonable indication of how the total payment is to be divided. Such an intended division may be indicated by the amount or portion of the total payment which is to be discontinued when the obligation to support a minor terminates. The Tax Court has endeavored, in prior opinions, to interpret section 22(k) in accordance with the intention of Congress not to tax as income to the wife funds supplied by the husband to be used by the wife in fulfilling his legal obligation to support their minor children. *Robert W. Budd*, 7 T.C. 413, affd. 177 F. 2d 198 (C.A. 6); *Warren Leslie, Jr.*, 10 T.C. 807; *George R. Joslyn*, 23 T.C. 126, affd. in part and reversed in part 230 F. 2d 871 (C.A. 7); *Mark B. Deitsch*, 26 T.C. 751, reversed on facts 249 F. 2d 534 (C.A. 6); *Truman W. Morsman*, 27 T.C. 520; *Russell W. Boettiger*, 31 T.C. 477; *Arthur G. B. Metcalf*, 31 T.C. 596, on appeal; *Mandel* [fol. 161] *v. Commissioner*, 185 F. 2d 50 (C.A. 7), affirming a Memorandum Opinion of this Court.

Here it is clearly indicated in the agreement of the parties and in the decree that a part of the payments from this husband to this wife were intended to be used by her for the support of their minor children. The agreement of April 16, 1951, sets forth the intention of the parties that the periodic payments to the wife are "for the maintenance and support of her and the aforesaid children of the parties, in discharge of the husband's legal obligations arising out of, or in connection with the marital and family relationship between the parties." It also states "that the welfare and best interests of the minor children of the parties hereto" are of paramount

concern and interest to the parties. Ardell did not have unrestricted use of the entire amount of the payments which she received from Jerry. They were not all available for her own use and benefit. She could be held accountable through court action for failure to use a proper portion of the funds received in each year for the adequate support of the minor children. The agreement and the decree must be examined to determine whether any sum or portion of the whole was fixed therein for the support of the minor children. The Commissioner in his determination has held that one-sixth of the payments received in each year was fixed by the agreement and the decree for the support of each minor child.

Paragraph 11 of the agreement begins with these words: "The husband agrees to pay the wife for the support and maintenance of herself and the children of the parties, namely, JUDY LESTER, JOAN LESTER and JAY LESTER, the following amounts * * *." Another provision [fol. 162] of that paragraph is: "In addition to the payments above provided the husband agrees to pay for extraordinary and unusual medical and dental expenses and fees incurred with respect to any of the children of the parties so long as they are minors and are not emancipated." The agreement does not state specifically that so many dollars or a certain portion of each periodic payment was for the support and maintenance of one or more of the three minor children. However, section 11 contains this provision: "In the event that any of the children of the parties hereto shall marry, become emancipated, or die, then the payments herein specified shall on the happening of each such event be reduced in a sum equal to one-sixth of the payments which would thereafter otherwise accrue and be payable in accordance with the terms and provisions hereof." A reasonable inference may fairly be drawn from reading this instrument as a whole that at least one-sixth of each payment was intended and fixed by the parties in the agreement to be used in the discharge of Jerry's obligation to support one of his minor children during its minority. That is in accordance with the Commissioner's determination which Jerry had the burden to disprove. He did not

testify. It is a fair and just result between the husband and wife, and the Court feels that it is the proper result under the law and facts of this case.

The Court of Appeals for the Second Circuit in the case of *Weil* v. *Commissioner*, 240 F. 2d 584, reversing the Tax Court, a case strongly relied upon by the petitioner, said:

> • • • Accordingly, if sums are to be considered "payable for the support of minor children," their use must be restricted to that purpose, and the wife must have no independent beneficial interest therein. This cannot be the case if the terms of the instrument contemplate a continuance of the payments to the wife after she has ceased to support the children.
>
> • • •

[fol. 163] Payments to the wife in that case were to continue without reduction, even though the necessity to support the children terminated, unless the wife remarried. It seems obvious from the opinion that the Court of Appeals placed considerable reliance on those provisions. The Court of Appeals for the Ninth Circuit in *Eisinger* v. *Commissioner*, 250 F. 2d 303, affirming a Tax Court Memorandum Opinion, said of the *Weil* case:

> We agree with it, in its application of law to the facts of that case, but do not find the legal position there taken applicable herein, nor do we agree with the generality of some of its language.

One of the distinctions made in the *Eisinger* case between that case and the *Weil* case was "that payments to the wife should not be revised, even though one or both children died, or became of age, or because either failed to longer live with their mother," whereas in the *Eisinger* case the payments to the wife were to be reduced by a specified amount as each child reached majority or died. The same distinction exists between the present case and the *Weil* case, the present case being like the *Eisinger* case rather than like the *Weil* case. Ardell lived in California during 1951 and 1952, and, if she were contesting the inclusion of these payments in her income, the Tax

Court would undoubtedly hold that one-half of the payments should not be included in her income. The Court of Appeals for the Ninth Circuit would apparently affirm. Cf. *Eisinger* v. *Commissioner, supra.* See also the opinion of the Court of Appeals for the Sixth Circuit in *Robert W. Budd, supra. Henrietta S. Seltzer,* 22 T.C. 203, is also distinguishable since there the record does not show that the payments may not continue to the wife after the obligation to support minor children terminates. The entire payments which Jerry was making to Ardell were [fol. 164] not to be continued uninterrupted in case support of the minor children became no longer necessary, but, on the contrary, were to be reduced by one-sixth for each child. Each case must be decided on its own facts and, on the facts here presented, it is not clear that the Court of Appeals for the Second Circuit, to which this case would probably go on appeal, might not decide, as we do, to sustain the determination of the Commissioner.

Decision will be entered for the Commissioner.

[fol.165] BEFORE THE TAX COURT
OF THE UNITED STATES
WASHINGTON

Docket No. 67540.

JERRY LESTER, PETITIONER,

v:

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

DECISION—Sept. 11, 1959

Pursuant to the determination of the Court, as s
forth in its Findings of Fact and Opinion, filed Septemb
9, 1959, it is

ORDERED AND DECIDED: That there are deficiencies
income tax of $7,572.39 for the year 1951, and $13,761.
for the year 1952.

/s/ J. E. MURDOCK
Judge.

Enter:
ENTERED SEP 11 1959

[fol. 166] IN THE UNITED STATES
COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 301—October Term, 1959.

(Argued May 3, 1960)

Docket No. 26020

JERRY LESTER, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

OPINION—June 6, 1960

Before:

LUMBARD, *Chief Judge*,

HAND, *Circuit Judge*, and JAMESON, *District Judge*.

On petition to review a decision of the United States Tax Court assessing against the petitioner deficiencies in income taxes for the years 1951-52.

LOUIS MANDEL, *for the petitioner*.

NORMAN H. WOLFE, *for the respondent*.

HAND, *Circuit Judge*:

Lester, the taxpayer, petitions to review an order of the United States Tax Court, holding him liable for deficiencies in his income tax for the years 1951-1952, based [fol. 167] upon the disallowance of deductions claimed by

him as payments of alimony. The facts were as follows: Lester and his wife had three children, aged 13, 11 and 9. They lived in Los Angeles and had been married on August 24, 1934. On April 16, 1951, while the wife was still living in California, though he had himself moved to New York, they entered into an agreement in anticipation of a divorce. This agreement provided that the custody and control of the children should be given to the wife subject to plaintiff's reasonable right of visitation and of having the children with him for thirty days during the summer vacation. The important provision was paragraph 11, which we quote in part:

"11. The husband agrees to pay the wife for the support and maintenance of herself and the children of the parties, namely, JUDY LESTER, JOAN LESTER and JAY LESTER, the following amounts commencing with the effective date of this agreement (as said term is hereinafter defined in subdivision (j) of this Article 11):

"(a) For the period ending December 31, 1951, a sum equal to 50% of the husband's gross income commencing with the effective date of this agreement, but not in excess of a total sum of $50,000.

"(b) For the calendar year immediately following the period set forth in subdivision (a) hereof, a sum equal to 25% of the husband's annual gross income during said period of one year, but not in excess of a total sum of $45,000.

"(c) For the calendar year immediately following the period set forth in subdivision (b) hereof, a sum equal to 25% of the husband's annual gross
[fol. 168] income during said period of one year, but not in excess of the total sum of $45,000.

"(d) For each year immediately following the period set forth in subdivision (c) hereof, a sum equal to 20% of husband's annual gross income during each such year, but not in excess of that sum each year which, after the payment of all income taxes assessable upon the wife with respect to the amounts thus paid to the wife shall equal $15,600.

"(f) In addition to the payments above provided the husband agrees to pay for any extraordinary and unusual medical and dental expenses and fees incurred with respect to any of the children of the parties so long as they are minors and are not emancipated.

• • • • •

"(i) All payments herein specified shall cease upon the death of the husband or the wife or upon the remarriage of the wife, whichever shall first occur. It is expressly agreed that the wife shall not have any claim against the estate of the husband, should he predecease her, for any sums payable hereunder, except such sums as may have been due and payable to her pursuant to the terms hereof prior to his death. In the event that any of the children of the parties hereto shall marry, become emancipated, or die, then the payments herein specified shall on the happening of each such event be reduced in a sum equal to one-sixth of the payments which would thereafter otherwise accrue and be payable in accordance with the terms and provisions hereof."

By paragraph 8(e) the parties also agreed that, so long as the husband was required by the agreement or by [fol. 169] law to support the children, he would cause them to be jointly named as beneficiaries to the extent of $30,000 of the proceeds payable under three life insurance policies assigned by his wife to him.

The taxpayer performed the agreement by paying to his wife the sums specified in paragraph 11 and deducted on his income tax returns as alimony the "periodic payments" made during the years 1951-52. The Commissioner and the Tax Court held that he was entitled to deduct only one half of these as alimony, because subdivision (i) of paragraph 11 showed that one half was all that she was entitled to keep for her own use, the other half being paid for the maintenance and support of the children.

The question involved has been the subject of a number of decisions as to the proper interpretation of § 22(k) of

the Internal Revenue Code of 1939, which provides that "periodic payments * * * in discharge of a legal obligation which, because of the marital or family relationship is imposed upon * * * such husband * * * shall be includible in the gross income of such wife." The "periodic payments" prescribed by the agreement were clearly imposed upon the taxpayer because of a "marital or family relationship"; and were therefore deductible by him. However, a difficulty arises from the succeeding sentence of § 22(k), which reads as follows: "This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband." The courts are not unanimous as to what is meant by the phrase, "fix in terms of an amount of money or a portion of the payment." In the case at bar the Commissioner and the Tax Court have read the language in paragraph 11(i) of the agreement as "fixing" one half of all the payments made to the wife as sums "payable for the support of minor [fol. 170] children of such husband." If they are so read, the decision of the Tax Court was of course right; if not, all the payments are to be regarded as gross income of the wife, and the deficiencies should be expunged.

In *Weil v. Commissioner*, 240 Fed. (2) 584, we held that a very similar agreement did not "fix * * * in terms * * * of a portion of the payment" what the wife was to spend for the support of the children. We held, p. 588, Judge Medina writing, "that sums are 'payable for the support of minor children' when they are to be used for that purpose only. Accordingly, if sums are to be considered 'payable for the support of minor children,' their use must be restricted to that purpose and the wife must have no independent beneficial interest therein." In that case the agreement did not provide for any reduction in the "periodic payments" if the wife remained unmarried, but it did reduce them upon the death or marriage of a child if she did remarry. The same reduction was to be made also in case a child cared to live apart from the wife after the wife remarried. So far as we can see our

second decision, *Hirshon's Estate* v. *Commissioner of Internal Revenue*, 250 Fed. (2) 497, neither adds to, nor detracts from, the first. *Deitsch* v. *Commissioner*, 249 Fed. (2) 534 (C. A. 6), accords with our interpretation and distinguished a former decision of the same court (*Budd* v. *Commissioner*, 177 Fed. (2) 198) on the ground that a fixed sum had been "earmarked" as payable for a son's support.

In *Eisinger* v. *Commissioner*, 250 Fed. (2) 303 (C. A. 9) and *Metcalf* v. *Commissioner*, 271 Fed. (2) 288 (C. A. 1) the "periodic payments" were not allocated as between support of the children and alimony, but they were reduced as each child reached majority or died. Both courts found in the provisions for such reductions evidence that the "terms" of the agreements had from the outset "fixed" a portion of the "periodic payments" as being "for the [fol. 171] support" of the children. For this reason they charged the wife's gross income with only the remaining portion of the payments. It is quite true as Judge Aldrich said in *Metcalf* v. *Commissioner*, *supra*, 291, that "it is highly impractical, if not impossible, to segregate every expense from day to day so that the parent has no independent beneficial interest therein.'" However, the language of the statute seems to us not to submit itself to be recast so freely. That part of a "periodic payment" that is not to be charged to the husband's gross income is only that which the "written instrument" (shall) "fix, in terms of * * * a portion of the payment, as a sum which is payable for the support," etc. It by no means follows, because when a child dies or marries or reaches twenty-one the "periodic payments" are diminished, that from the outset that child's support has been "fixed" by the amount of the possible reduction. Indeed such a construction would defeat what is the basic meaning of such an agreement, for the mother is to be free to use her judgment in allocating the collective unit among her children and herself. It is true that it is assumed that she will use the payments to some extent to support the children, but we need not say that there could never be occasion when a court would overrule her discretion. In any case she is ordinarily free to allocate the payments as she

thinks best, from time to time, spending on herself what she may think will in the end be for the best of the group. The fact that, when the group changes, the "periodic payments" are reduced in a "fixed" proportion does not indicate that meanwhile the wife's discretionary power has been limited. Indeed, we do not see why, if the existing allocation at the time of a child's death, marriage, or majority were to determine his proportion of the earlier payments, it does not follow that the wife's discretion is taken away altogether. Unless we have misapprehended its meaning, Congress intended to tax the wife on all [fol. 172] the payments unless the agreement itself declared in what proportion she must allocate them to the children.

The Tax Court seems to have thought that it would be unfair to impose upon the wife an income tax upon that part of the payments that might be used to discharge the husband's duty to support the children. The sentence of § 22(k) that we are discussing recognizes this possibility and attempts to provide against it, but Congress apparently thought that it was impossible to do so except when the agreement "fixes" in advance some "portion of the payment, as a sum which is payable for the support of minor children." When the agreement does this the spouses have made the best forecasts they can as to what the allocation shall be. Like all other forecasts they are necessarily no more than guesses, and what seems a fair division today will often prove grossly unfair tomorrow. But there is no escape from accepting that chance except by repeated appraisals of the relative needs of the individuals making up the group; and we agree with Judge Aldrich that that "is highly impractical, if not impossible."

Moreover, it is not so gross a solecism as it might appear to make the wife's income tax depend in part upon receipts that she gives to others. If, as we have tried to show, there is no other way to meet the prime purpose o the spouses but to leave the allocation from time to time in the wife's hands, it is an unavoidable consequence that she will be taxed on whatever she gives away. We cannot find in that an injustice that demands the disregard of plain language patently chosen with care. In spite

of that burden, the control of the wife still has most of the component interests that in combination are "property." She may believe it desirable at times not to allocate to a child any "part" of a "periodic payment," because the child needs her continued supervision at home, [fol. 173] and that free spending money is the one thing to be avoided. When all is said there is little difference between a control so nearly absolute as this and full fledged "ownership." "But what are the rights of ownership? They are substantially the same as those incident to possession. Within the limits prescribed by policy the owner is allowed to exercise his power over the subject-matter uninterfered with and is more or less protected in excluding others from such interference. The owner is allowed to exclude and is accountable to no one. The possessor is allowed to exclude all but one and is accountable to no one but him." (Holmes, *The Common Law*, p. 246.).

Order reversed; tax deficiencies expunged.

[fol. 174] IN THE UNITED STATES
COURT OF APPEALS

SECOND CIRCUIT

* * * *

JERRY LESTER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

JUDGMENT—June 6, 1960

Appeals from The Tax Court of the United States

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is reversed and that the tax deficiencies be and they hereby are expunged in accordance with the opinion of this Court.

s/ A. DANIEL FUSARO
Clerk

(File Endorsement Omitted)

[fol. 175] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 176] SUPREME COURT OF THE UNITED STATES

No. 376, October Term, 1960

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

JERRY LESTER

ORDER ALLOWING CERTIORARI. November 14, 1960.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED
AUG 31
JAMES R. BROWNING, Clerk

No. 376

In the Supreme Court of the United States

OCTOBER TERM, 1960

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JERRY LESTER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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CHARLES K. RICE,
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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. —

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JERRY LESTER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 3a–11a)[1] are reported at 32 T.C. 1156. The opinion of the Court of Appeals (Appendix A, *infra*, pp. 11–18) is not yet officially reported.

[1] Record references are to the Appendix to the brief for the taxpayer in the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 1960. (Appendix A, *infra*, p. 18.) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The terms of a property setlement agreement, incident to divorce, provided that the taxpayer make periodic payments to his former wife for the support and maintenance of herself and their three minor children. The payments were to be reduced by one-sixth upon the marriage, emancipation or death of each child. The question is whether the agreement fixed one-sixth of the taxpayer's periodic payments as payable for the support of each of his three minor children with the result that the amounts so fixed were not deductible by the taxpayer as sums expended for the support of his former wife under the provisions of Sections 22(k) and 23(u) of the Internal Revenue Code of 1939.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes, Section 22(k) and Section 23(u) of the Internal Revenue Code of 1939, and Section 29.22(k)–1 and Section 29.23(u)–1 of Treasuary Regulations 111 are set forth in Appendix B, *infra*, pp. 19–22.

STATEMENT

Jerry Lester, the taxpayer, and his former wife entered into a property settlement agreement on April 16, 1951, in anticipation of divorce.[2] The agreement provided that the wife should have custody of their three children, then thirteen, eleven and nine years of age, respectively, subject to the taxpayer's reasonable right of visitation and of having the children with him for thirty days during the summer vacation. (R. 3a–4a; Appendix A, *infra*, pp. 11–12.)

Paragraph 11 of the agreement provided for the payment of the following amounts by the taxpayer to his former wife for the support of herself and their three minor children: for the period commencing with the effective date of the agreement and ending December 31, 1951, fifty per cent of the husband's gross income but not in excess of $50,000; for each of the following two calendar years, twenty-five per cent of the husband's annual gross income but not in excess of $45,000 each year; for each year immediately thereafter, twenty per cent of the husband's annual gross income but not in excess of the sum each year which, after the payment of all income taxes assessable upon the wife with respect to the amounts thus paid to her,

[2] The parties already were separated. The wife remained a resident of California in 1951 and 1952, while the taxpayer moved to New York. On April 27, 1951, a California court entered an interlocutory judgment of divorce between the taxpayer and his wife which ratified, confirmed and approved the agreement of April 16, 1951. The final decree of divorce in the California action was entered on November 5, 1952. (R. 3a, 5a–6a.)

shall equal $15,600. All payments were to terminate upon the death of the husband or the wife or upon the remarriage of the wife. (R. 4a–5a; Appendix A, *infra,* pp. 12–13.) In addition, paragraph 11(i) provided (R. 5a; Appendix A, *infra,* p. 13):

> In the event that any of the children of the parties hereto shall marry, become emancipated, or die, then the payments herein specified shall on the happening of each such event be reduced in a sum equal to one-sixth of the payments which would thereafter otherwise accrue and be payable in accordance with the terms and provisions hereof.

The taxpayer also agreed that he would pay any extraordinary medical and dental expenses of the children so long as they were minors and unemancipated (R. 5a, Appendix A, *infra,* pp. 12–13) and that so long as he was required by the agreement or by law to support his children he would cause them to be jointly named as beneficiaries to the extent of $30,000 of the proceeds payable under three insurance policies (Appendix A, *infra,* p. 13).

Pursuant to the agreement, the taxpayer made periodic payments of $23,000 in 1951 and $39,500 in 1952. He deducted these amounts on his income tax returns for those years as alimony. (R. 6a; Appendix A, *infra,* p. 13.) In deficiency proceedings, the Tax Court upheld the Commissioner's determination disallowing one-half of each claimed deduction, on the basis that half the amounts paid were fixed by the agreement as payable for the support of the three minor children of the taxpayer. (R. 10a, 11a; Appen-

dix A, *infra*, p. 13.) The Court of Appeals reversed, holding that the agreement did not fix the amounts payable for child support. (Appendix A, *infra*, pp. 16, 18.)

REASONS FOR GRANTING THE WRIT

The opinion of the Court of Appeals expressly disagrees with decisions of the Ninth Circuit in *Eisinger* v. *Commissioner*, 250 F. 2d 303, certiorari denied, 356 U.S. 913, and of the First Circuit in *Metcalf* v. *Commissioner*, 271 F. 2d 288. Each of these cases presents the identical question of statutory construction—a question which is a frequently recurring one. A uniform interpretation of the underlying statutory provisions is essential to the equitable administration of the tax laws and to the planning of economic arrangements between parties to divorce proceedings and separation agreements.

1. The Second Circuit, following two of its earlier decisions,[3] interprets Sections 22(k) and 23(u) of the 1939 Code (Appendix B, *infra*, pp. 19–20) [4] as providing that periodic payments by a husband to his divorced or legally separated wife are "payable for the support of minor children" only when their use is

[3] *Weil* v. *Commissioner*, 240 F. 2d 584, certiorari denied, 353 U.S. 958, and *Hirshon's Estate* v. *Commissioner*, 250 F. 2d 497.

[4] Sections 22(k) and 23(u) of the 1939 Code (analogous to Sections 71 and 215 of the 1954 Code) provide that a divorced or legally separated wife shall include in her income, and her husband may deduct, periodic payments made pursuant to the decree or written instrument incident to the divorce or separation. Under these sections the wife does not include in her income, and the husband cannot deduct, amounts fixed by the decree or agreement as payable for the support of the husband's minor children.

restricted by the terms of the decree or agreement *exclusively* to that purpose and the wife has "no independent beneficial interest therein." The Second Circuit's view is that the possibility that the wife may have some discretion with respect to the allocation of particular sums to the children from time to time provides her with a control substantially equivalent to full-fledged ownership of the payments, with the result that the husband may deduct (and the wife must pay tax upon) the entire amount of the periodic payments.

In contrast, the Ninth Circuit in *Eisinger* v. *Commissioner, supra* (purporting to state the general rule (250 F. 2d at p. 308)), and the First Circuit in *Metcalf* v. *Commissioner, supra,* have resolved the same question on the basis that if the agreement, taken as a whole, reveals an intention by the parties to earmark or designate a definite portion of the husband's periodic payments for the support of his minor children (as distinguished from amounts payable for alimony), then the "terms of the decree or written instrument fix * * * a sum which is payable for the support of minor children of such husband" and he may not deduct that sum in computing his liability for income tax.[5] In both *Eisinger* (250 F. 2d at 306) and *Metcalf* (271 F. 2d at 291), the courts,

[5] See, also, *Mandel* v. *Commissioner*, 185 F. 2d 50 (C.A. 7), and *Budd* v. *Commissioner*, 177 F. 2d 198 (C.A. 6), to the same effect; and see *Deitsch* v. *Commissioner*, 249 F. 2d 534, 536 (C.A. 6).

though reconciling the cases on their particular facts, expressly criticized the language employed by the Second Circuit in the *Weil* and *Hirshon's Estate* cases *supra*.[6]

The Second Circuit does not purport to draw any distinction between the allocation provisions of the agreements in *Eisinger* and *Metcalf* and those in *Lester*, but expressly disagrees with the interpretation of the statutes by the Ninth and First Circuits (Appendix A, *infra*, pp. 15–16). It flatly rejects the view that the agreement should be examined as a whole to determine whether any portion of the payments have been adequately "earmarked" as payable for child support.

2. The question in this case is a frequently recurring problem in the administration of the revenue laws[7] and a uniform interpretation of the

[6] Pointing out the difference in approach, the First Circuit stated (*Metcalf* v. *Commissioner*, *supra*, 271 F. 2d at 291):

> Where a home is run as a unit, as is contemplated in the case of a parent having custody of minor children, it is highly impractical, if not impossible, to segregate every expense from day to day so that the parent has "no independent beneficial interest therein."

[7] As the result of a preliminary search, the Internal Revenue Service informs us that there are now pending administratively (or in the Tax Court) at least 82 other cases involving the same issue. *Ashe* v. *Commissioner*, 33 T.C. 331, is pending before the Sixth Circuit: *Haber* v. *Commissioner*, decided May 4, 1960, (1960 P.H.T.C. Memorandum Decisions, par. 60,084), is pending before the Fourth Circuit on the husband's appeal and before the Second Circuit on the Commissioner's protective appeal.

statute is of obvious importance.[8] The present lack of uniformity leads to inequity—to differing tax treatment of parties who have entered into agreements of the same kind. Furthermore, the incidence of tax is a substantial factor for consideration by parties planning such arrangements for the future. In view of the present conflict among the circuits, the economic consequences of many practical arrangements of this type cannot be forecast with any certainty, particularly since the incidence of tax may be altered by subsequent changes of residence of the parties. Under certain circumstances, this may result in hardship for one of the parties or for the children, or in unwarranted tax avoidance.[9]

The resolution of the conflict by this Court would avoid substantial continuing litigation on this subject, make for uniformity and certainty of interpretation, and enable divorcing or separating spouses to enter

---

[8] With respect to Sections 22(k) and 23(u), *inter alia*, H. Rep. No. 2333, 77th Cong., 2d Sess., p. 72 (1942-2 Cum. Bull. 372, 427) states:

> * * * the amended sections will produce uniformity in the treatment of amounts paid in the nature of or in lieu of alimony regardless of variance in the laws of different States concerning the existence and continuance of an obligation to pay alimony.

See, also, S. Rept. No. 1631, 77th Cong., 2d Sess., p. 83 (1942-2 Cum. Bull. 504, 568) to the same effect.

[9] For example, children and divorced wives in the circumstances of the *Lester*, *Eisinger* and *Metcalf* cases might suffer disadvantage by the imposition of tax if they changed their residences to areas within the jurisdiction of the Second Circuit. Similarly, husbands in such circumstances might avoid tax by a change of residence. See *Häber* v. *Commissioner*, noted in footnote 7, *supra*, in which the husband's and wife's cases are pending before different courts of appeals.

into arrangements for the support of their children with knowledge of the income tax consequences regardless of future changes of residence. Without regard to the correctness of the holding in the instant case, the sharp conflict between the circuits should be resolved.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
C. GUY TADLOCK,
NORMAN H. WOLFE,
Attorneys.

AUGUST 1960

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 301—October Term, 1959

(Argued May 3, 1960. Decided June 6, 1960)

Docket No. 26020

JERRY LESTER, PETITIONER, *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Before LUMBARD, *Chief Judge,* HAND, *Circuit Judge,* and JAMESON, *District Judge.*

On petition to review a decision of the United States Tax Court assessing against the petitioner deficiencies in income taxes for the years 1951–52.

HAND, *Circuit Judge:*

Lester, the taxpayer, petitions to review an order of the United States Tax Court, holding him liable for deficiencies in his income tax for the years 1951–52, based upon the disallowance of deductions claimed by him as payments of alimony. The facts were as follows: Lester and his wife had three children, aged 13, 11 and 9. They lived in Los Angeles and had been married on August 24, 1934. On April 16, 1951, while the wife was still living in California, though he had himself moved to New York, they entered into an agreement in anticipation of a divorce. This agreement provided that the custody and control of the children should be given to the wife subject to plaintiff's reasonable right of visitation and of hav-

ing the children with him for thirty days during the summer vacation. The important provision was paragraph 11, which we quote in part:

> 11. The husband agrees to pay the wife for the support and maintenance of herself and the children of the parties, namely, Judy Lester, Joan Lester and Jay Lester, the following amounts commencing with the effective date of this agreement (as said term is hereinafter defined in subdivision (j) of this Article 11):
>
> (a) For the period ending December 31, 1951, a sum equal to 50% of the husband's gross income commencing with the effective date of this agreement, but not in excess of a total sum of $50,000.
>
> (b) For the calendar year immediately following the period set forth in subdivision (a) hereof, a sum equal to 25% of the husband's annual gross income during said period of one year, but not in excess of a total sum of $45,000.
>
> (c) For the calendar year immediately following the period set forth in subdivision (b) hereof, a sum equal to 25% of the husband's annual gross income during said period of one year, but not in excess of the total sum of $45,000.
>
> (d) For each year immediately following the period set forth in subdivision (c) hereof, a sum equal to 20% of husband's annual gross income during each such year, but not in excess of that sum each year which, after the payment of all income taxes assessable upon the wife with respect to the amounts thus paid to the wife shall equal $15,600.
>
> (f) In addition to the payments above provided the husband agrees to pay for any extraordinary and unusual medical and dental expenses and fees incurred with respect to any

of the children of the parties so long as they are minors and are not emancipated.

* * * * *

(i) All payments herein specified shall cease upon the death of the husband or the wife or upon the remarriage of the wife, whichever shall first occur. It is expressly agreed that the wife shall not have any claim against the estate of the husband, should he predecease her, for any sums payable hereunder, except such sums as may have been due and payable to her pursuant to the terms hereof prior to his death. In the event that any of the children of the parties hereto shall marry, become emancipated, or die, then the payments herein specified shall on the happening of each such event be reduced in a sum equal to one-sixth of the payments which would thereafter otherwise accrue and be payable in accordance with the terms and provisions hereof.

By paragraph 8(e) the parties also agreed that, so long as the husband was required by the agreement or by law to support the children, he would cause them to be jointly named as beneficiaries to the extent of $30,000 of the proceeds payable under three life insurance policies assigned by his wife to him.

The taxpayer performed the agreement by paying to his wife the sums specified in paragraph 11 and deducted on his income tax returns as alimony the "periodic payments" made during the years 1951–52. The Commissioner and the Tax Court held that he was entitled to deduct only one half of these as alimony, because subdivision (i) of paragraph 11 showed that one half was all that she was entitled to keep for her own use, the other half being paid for the maintenance and support of the children.

The question involved has been the subject of a number of decisions as to the proper interpretation of § 22(k) of the Internal Revenue Code of 1939, which provides that "periodic payments * * * in discharge of a legal obligation which, because of the marital or family relationship is imposed upon * * * such husband * * * shall be includible in the gross income of such wife." The "periodic payments" prescribed by the agreement were clearly imposed upon the taxpayer because of a "marital or family relationship"; and were therefore deductible by him. However, a difficulty arises from the succeeding sentence of § 22(k), which reads as follows: "This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband." The courts are not unanimous as to what is meant by the phrase, "fix in terms of an amount of money or a portion of the payment." In the case at bar the Commissioner and the Tax Court have read the language in paragraph 11(i) of the agreement as "fixing" one half of all the payments made to the wife as sums "payable for the support of minor children of such husband." If they are so read, the decision of the Tax Court was of course right; if not, all the payments are to be regarded as gross income of the wife, and the deficiencies should be expunged.

In *Weil* v. *Commissioner*, 240 Fed. (2) 584, we held that a very similar agreement did not "fix * * * in terms * * * of a portion of the payment" what the wife was to spend for the support of the children. We held, p. 588, Judge Medina writing, "that sums are 'payable for the support of minor children' when they are to be used for that purpose only. Accord-

ingly, if sums are to be considered 'payable for the support of minor children,' their use must be restricted to that purpose and the wife must have no independent beneficial interest therein." In that case the agreement did not provide for any reduction in the "periodic payments" if the wife remained unmarried, but it did reduce them upon the death or marriage of a child if she did remarry. The same reduction was to be made also in case a child cared to live apart from the wife after the wife remarried. So far as we can see our second decision, *Hirshon's Estate* v. *Commissioner of Internal Revenue*, 250 Fed. (2) 497, neither adds to, nor detracts from, the first. *Deitsch* v. *Commissioner*, 249 Fed. (2) 534 (C.A. 6), accords with our interpretation and distinguished a former decision of the same court (*Budd* v. *Commissioner*, 177 Fed. (2) 198) on the ground that a fixed sum had been "earmarked" as payable for a son's support.

In *Eisinger* v. *Commissioner*, 250 Fed. (2) 303 (C. A. 9) and *Metcalf* v. *Commissioner*, 271 Fed. (2) 288 (C. A. 1) the "periodic payments" were not allocated as between support of the children and alimony, but they were reduced as each child reached majority or died. Both courts found in the provisions for such reductions evidence that the "terms" of the agreements had from the outset "fixed" a portion of the "periodic payments" as being "for the support" of the children. For this reason they charged the wife's gross income with only the remaining portion of the payments. It is quite true as Judge Aldrich said in *Metcalf* v. *Commissioner*, *supra*, 291, that "it is highly impractical, if not impossible, to segregate every expense from day to day so that the parent has 'no independent beneficial interest therein.'" However, the language of the statute seems to us

not to submit itself to be recast so freely. That part of a "periodic payment" that is not to be charged to the husband's gross income is only that which the "written instrument" (shall) "fix, in terms of * * * a portion of the payment, as a sum which is payable for the support," etc. It by no means follows, because when a child dies or marries or reaches twenty-one the "periodic payments" are diminished, that from the outset that child's support has been "fixed" by the amount of the possible reduction. Indeed such a construction would defeat what is the basic meaning of such an agreement, for the mother is to be free to use her judgment in allocating the collective unit among her children and herself. It is true that it is assumed that she will use the payments to some extent to support the children, but we need not say that there could never be occasions when a court would overrule her discretion. In any case she is ordinarily free to allocate the payments as she thinks best, from time to time, spending on herself what she may think will in the end be for the best of the group. The fact that, when the group changes, the "periodic payments" are reduced in a "fixed" proportion does not indicate that meanwhile the wife's discretionary power has been limited. Indeed, we do not see why, if the existing allocation at the time of a child's death, marriage, or majority were to determine his proportion of the earlier payments, it does not follow that the wife's discretion is taken away altogether. Unless we have misapprehended its meaning, Congress intended to tax the wife on all the payments unless the agreement itself declared in what proportion she must allocate them to the children.

The Tax Court seems to have thought that it would be unfair to impose upon the wife an income tax upon that part of the payments that might be used to discharge the husband's duty to support the children. The sentence of §22(k) that we are discussing recog-

nizes this possibility and attempts to provide against it, but Congress apparently thought that it was impossible to do so except when the agreement "fixes" in advance some "portion of the payment, as a sum which is payable for the support of minor children." When the agreement does this the spouses have made the best forecasts they can as to what the allocation shall be. Like all other forecasts they are necessarily no more than guesses, and what seems a fair division today will often prove grossly unfair tomorrow. But there is no escape from accepting that chance except by repeated appraisals of the relative needs of the individuals making up the group: and we agree with Judge Aldrich that that "is highly impractical, if not impossible."

Moreover, it is not so gross a solecism as it might appear to make the wife's income tax depend in part upon receipts that she gives to others. If, as we have tried to show, there is no other way to meet the prime purpose of the spouses but to leave the allocation from time to time in the wife's hands, it is an unavoidable consequence that she will be taxed on whatever she gives away. We cannot find in that an injustice that demands the disregard of plain language patently chosen with care. In spite of that burden, the control of the wife still has most of the component interests that in combination are "property." She may believe it desirable at times not to allocate to a child any "part" of a "periodic payment," because the child needs her continued supervision at home, and that free spending money is the one thing to be avoided. When all is said there is little difference between a control so nearly absolute as this and full fledged "ownership." "But what are the rights of ownership? They are substantialy the same as those incident to possession. Within the limits prescribed by policy the owner is allowed to exercise his power

over the subject-matter uninterfered with and is more or less protected in excluding others from such interference. The owner is allowed to exclude and is accountable to no one. The possessor is allowed to exclude all but one and is accountable to no one but him." (Holmes, *The Common Law*, p. 246.)

Order reversed; tax deficiencies expunged.

JUDGMENT

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of June one thousand nine hundred and sixty.

Present: Hon. J. EDWARD LUMBARD, Chief Judge, Hon. LEARNED HAND, Circuit Judge, Hon. WILLIAM J. JAMESON, District Judge, *Circuit Judges*.

JERRY LESTER, PETITIONER *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

APPEALS FROM THE TAX COURT OF THE UNITED STATES

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is reversed and that the tax deficiencies be and they hereby are expunged in accordance with the opinion of this Court.

/S/ A. DANIEL FUSARO,
Clerk.

APPENDIX B

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

* * * * * *

(k) [As added by Section 120(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Alimony, Etc., Income.*—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written in-

strument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband. In case any such periodic payment is less than the amount specified in the decree or written instrument, for the purpose of applying the preceding sentence; such payment, to the extent of such sum payable for such support, shall be considered a payment for such support. * * *

* * * * * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * *

(u) [As added by Section 120(b) of the Revenue Act of 1942, *supra*] *Alimony, Etc., Payments.*—In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k) or section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection.

* * * * * *

(26 U.S.C. 1952 ed., Sec. 23.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.22(k)-1. *Alimony and Separate Maintenance Payments.—Income to Former Wife.*—

* * * * * *

(d) [As amended by T.D. 5425, 1945 Cum. Bull. 10] *Payments for support of minor children.*—Section 22(k) does not apply to that

part of any periodic payment which, by the terms of the decree or the written instrument under section 22(k), is specifically designated as a sum payable for the support of minor children of the husband. The statute prescribes the treatment in cases where an amount or portion is so fixed but the amount of any periodic payment is less than the amount of the periodic payment specified to be made. In such cases, to the extent of the amount which would be payable for the support of such children out of the originally specified periodic payment, such periodic payment is considered a payment for such support. For example, if the husband is by terms of the decree required to pay $200 a month to his divorced wife, $100 of which is designated by the decree to be for the support of their minor children, and the husband pays only $150 to his wife, $100 is nevertheless considered to be a payment by the husband for the support of the children. If, however, the periodic payments are received by the wife for the support and maintenance of herself and of minor children of the husband without such specific designation of the portion for the support of such children, then the whole of such amounts is includible in the income of the wife as provided in section 22(k). Except in cases of a designated amount or portion for the support of the husband's minor children, periodic payments described in section 22(k) received by the wife for herself and any other person or persons are includible in whole in the wife's income, whether or not the amount or portion for such other person or persons is designated.

Sec. 29.23(u)–1. *Periodic Alimony Payments.*—A deduction is allowable under section 23(u) with respect to periodic payments in the nature of, or in lieu of, alimony or an allowance for support actually paid by the taxpayer during his taxable year and required to be in-

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cluded in the income of the payee wife or former wife, as the case may be, under section 22(k). As to the amounts required to be included in the income of the wife or former wife, as the case may be, see section 29.22(k)–1. (For definition of husband and wife in such cases, see section 3797(a)(17).)

* * * * *

Sections 39.22(k)–1 and 39.23(u)–1 of Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939, effective January 1, 1952, are to the same effect as the sections set out above.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 376

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

JERRY LESTER,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Question Presented

The question presented is whether the Court of Appeals was correct in holding that all payments to taxpayer's wife were alimony where the agreement provided that all payments ceased upon the wife's remarriage regardless of the ages of the children, and where there was no allocation of any amount or portion of the payments which must be used for the support of the children.

Statement

Jerry Lester and his former wife entered into a Separation Agreement on April 16, 1951. This agreement intended and provided that the wife was to pay the income tax on all monies received by her (R. 5a).[1] They were subse-

[1] Record references are to the Appendix to taxpayer's brief in the Court of Appeals.

quently divorced, and the Separation Agreement was made part of the decree, and included therein. The Separation Agreement provides for payments to the wife of stated percentages of the husband's income (R. 4a-5a). The agreement further provides that all payments to the wife are to cease upon her remarriage, regardless of the ages of the children (R. 5a). The agreement also provided that payments to the wife would be reduced by one sixth in the event any of the children married, became emancipated, or died. Despite this percentage reduction, the maximum payments which the wife could receive were not reduced and remained constant. The agreement did not provide that any or portion of the payments to the wife was required to be used for the support of the children.

Summary of Argument

The Writ should not be granted because the decision below is not in direct conflict with the decision of another Court of Appeals; it turns on the interpretation of a particular agreement; and it presents no problem of continuing importance in the administration of the tax laws.

Argument

1. There is no real conflict in decisions between the Circuits. Each of these cases must be decided on its own facts. In no case cited in the Petition do all of the payments cease upon the remarriage of the wife, regardless of the ages of the children, as they do in the instant case, nor are the facts similar to the instant case. The same may be said of the cases which the petition claims are awaiting decision.

As a matter of fact, in opposing Petitions for Certiorari by taxpayers, the Petitioner here has taken pains to show this Court that no such conflict exists. For example, in

opposing Certiorari in *Weil* v. *Commissioner*, 240 F. 2d 584, Cert. den. 353 U. S. 958 the government there said on page 10 of its brief:

> "Whether an agreement incident to a divorce fixes a portion of the amounts payable by the husband to the wife as payable for the support of minor children within the purview of Section 22(k), necessarily depends upon the particular terms of the agreement read as a whole. Both courts below were in agreement on this score, but differed as to the construction to be placed upon the agreement as a whole, each emphasizing different provisions. While we believe that the Tax Court's interpretation is a reasonable one, and so contended in the Court below, it cannot be said that the interpretation adopted by the Court of Appeals is not also a permissible one. Certainly the issue presented, turning as it does upon *the construction of the terms of a particular agreement is not of sufficient importance to warrant further review by this Court.*" (emphasis added)

The same may be said here, and this petition should be denied.

Again, in opposing Certiorari in *Eisinger* v. *Commissioner*, 250 F. 2d 303, Cert. den. 356 U. S. 913 the government did not find the conflict between the very same cases in the Ninth, Sixth and Second Circuits which it now claims, but rather stated at page 9 of its brief in opposition:

> "There is no direct conflict. Since determination of the question depends upon the construction of the particular agreement in issue, the taxpayer's contention that the decision below is contrary to the decisions in *Deitsch* v. *Commissioner*, 249 F. 2d 534 (C. A. 6th), *Estate of Hirshon* v. *Commissioner*, (C. A. 2d), decided December 5, 1957 (58-1) U. S. T. C. par. 9116, modified on rehearing, January 3, 1958 (58-1 U. S. T. C. par. 9192), and *Weil* v. *Commissioner*, 240 F. 2d 584 (C. A. 2d), certiorari denied, 353 U. S. 958, *is plainly without merit.*" (emphasis added)

"Indeed, the court below expressly agreed with the Weil case in its application of the law to the facts, although it did not agree with the generality of some of its language.

* * * While there is language in the opinion of the Court of Appeals in the Weil case indicating its disapproval of prior Tax Court decisions, the opinion concludes by adopting the view in many of the decisions of that and other courts already cited, that the instrument 'must be read as a whole' and that 'No particular formula * * * is necessary.'

The Court below expressed disagreement with the Sixth Circuit's decision in *Deitsch* v. *Commissioner*, *supra;* however since both courts agree that this question is one of construction, and since both courts agree that the instrument must be read as a whole, this disagreement must be deemed to be factual in nature and to turn upon the Sixth Circuit's construction of the particular settlement agreement. The opinion in the *Deitsch* case fully supports this view. * * *"

It is respectfully submitted that this Court, by denying Certiorari in the *Weil* and *Eisinger* cases, *supra*, agreed that there was no real conflict between the Circuits.

In effect, the government is saying that when it wins a case there is no conflict between the Circuits, but merely a difference in the facts of each case. However, when it loses this difference in the facts becomes a serious conflict between the Circuits. In all justice this is not and cannot be so. If, as the government claimed, there was no conflict when the Eisinger case was decided, there is no conflict now. The Second Circuit in the opinion below does not reject the proposition that each agreement must be read to determine if it earmarks a portion of the payments as payable for support of the children. On the contrary, the Court stated that the language of the agreement, and in particular paragraph 11(j) (Pet. App. page 14) was interpreted by the Commissioner one way. The Court of Appeals then

proceeded to read the language of the agreement as not fixing an amount as payable for the support of the children.

All of the cases decided in the various Circuits hold that it is only the amount of the payment which continues to be payable to the wife after her remarriage which may be said to be allocated as payable for support of the children prior to her remarriage. *Eisinger* v. *Commissioner* 250 F. 2d 303 (C. A. 9) cert. den. 356 U. S. 913, *Metcalf* v. *Commissioner* 185 F. 2d 50 (C. A. 7), *Budd* v. *Commissioner* 177 F. 2d 198 (C. A. 6).

In the instant case, after the wife remarries, all payments cease regardless of the ages of the children, and therefore the entire payment is alimony. Thus, it is consistent with the above cited cases in the other Circuits, since all of the cases hold that the amount by which the payments are reduced upon the remarriage of the wife is alimony, and the amount which is paid for the children is allocated as child support. In the immediate case since all payments cease upon the remarriage of the wife the holding that all of the payments were for alimony is correct, and consistent with the decisions in the other Circuits.

The attention of the Court is respectfully directed to paragraph 11(d) of the agreement (R. 5a) which provides for maximum payment to the wife for years during which the children would be minors as well as emancipated. It is noteworthy that this maximum payment is not reduced even though the percentage payments are reduced when the children marry or become emancipated. This point again illustrates that each of these cases must be decided on its facts, and that the decision in this case is consistent with the decisions of the other Circuits.

It is therefore respectfully submitted that this Court should adhere to its prior position in denying certiorari. Since each case must be decided on its facts, the decisions of the Circuits are consistent and there is no real conflict between the Circuits.

2. The issue presented here is not likely to be of importance in the administration of the tax laws, and does not warrant review by this Court.

In opposing certiorari in *Weil* v. *Commissioner*, 240 F. 2d 584, cert. den. 353 U. S. 958, the government said in its brief at page 11:

> "The issue here presented is not likely to be a continuing one, since it arises only because the terms of the agreement here involved are ambiguous with respect to payments for support of minor children. * * *"

Certainly, with the advance of time, this statement is more true now than it was when made. With the many decisions on record, and the new legislation of the 1954 Code, counsel for separating spouses should have no trouble in adequately expressing their intentions so as to avoid this type of litigation in the future.

Since, as the government points out, the issue is not likely to be a continuing one and since it is also necessary to look at the specific facts of each case, it is difficult to conceive how a decision in this case would affect the cases the government claims are awaiting decision, because their fact situations are not necessarily the same as the case at bar. Therefore, this case does not warrant further review by the Court.

CONCLUSION

The decision below is not in direct conflict with the decision of another Court of Appeals: it turns upon the interpretation of a particular agreement; and it presents no problem of continuing importance in the administration of the tax laws. The petition should be denied.

Respectfully submitted,

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COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JERRY LESTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Contrary to taxpayer's assertions (Br. 2–4), the Commissioner's petition in this case is not inconsistent with the Government's prior opposition to certiorari in *Weil* v. *Commissioner*, 240 F. 2d 584 (C.A. 2d), certiorari denied, 353 U.S. 958, and *Eisinger* v. *Commissioner*, 250 F. 2d 303 (C.A. 9th), certiorari denied, 356 U.S. 913.

At the time of the *Weil* and *Eisinger* opinions, it was not clear that no factual distinctions could be drawn between the cases decided by the Second and Ninth Circuits. Indeed, in *Eisinger* (250 F. 2d at 306), the Ninth Circuit, though it criticized the language of the Second Circuit in *Weil*, sought to reconcile that case in terms of its particular facts.[1] Con-

[1] Subsequently, the First Circuit, in *Metcalf* v. *Commissioner*, 271 F. 2d 288, 291, took the same view and also reconciled *Deitsch* v. *Commissioner*, 249 F. 2d 534 (C.A. 6th).

sequently, our view at that point was that any seeming conflict of approach was subject to an explanation on the basis of factual differences in the cases.

As our petition states, an express conflict among the Circuits has now crystallized. The conflict does not relate merely to the peculiar terms of a few individual agreements but, as indicated by the extensive pending litigation (see Pet. 7, fn. 7), it concerns the interpretation of a federal tax statute affecting the rights of parties to countless past and future separation agreements and divorce decrees. In its opinion in the present case, the Second Circuit suggests no distinction between the circumstances of *Lester* and those of *Eisinger* and *Metcalf*, but expressly disagrees with the interpretation of the applicable statutory provisions adopted by the Ninth and First Circuits. The conflict which had been lurking behind the prior decisions of the Courts of Appeals has thus become explicit.

It is now apparent, therefore, that contrary to the expressed intention of Congress (see Pet. 8, fn. 8), the income tax consequences of similar separation agreements may differ, depending upon the residence of one or both of the spouses (see Pet. 8, fn. 9). The litigation which has occurred to date shows that uncertainty and inequity inevitably result from divergent interpretations of the statute. We believe, therefore, that the matter is one which should be resolved by this Court.

Respectfully submitted.

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NOVEMBER 1960.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 376

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JERRY LESTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 9–17) are reported at 32 T.C. 1156. The opinion of the Court of Appeals (R. 19–25) is reported at 279 F. 2d 354.

JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 1960. (R. 26.) The petition for a writ of certiorari was filed on August 31, 1960, and was granted on November 14, 1960. (364 U.S. 890; R. 27.) The jurisdiction of this Court rests on 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

The settlement agreement between the taxpayer and his divorced wife provides that the taxpayer is to make specified periodic payments to the wife for both her own support and the support and maintenance of their three children. These periodic payments to the wife are to be reduced by one-sixth on the death, emancipation, or marriage of each of the children (a total of one-half for the three children). The question presented is whether these reduction provisions "fix" one-half of the periodic payments as a portion which is "payable for" the children's support (as distinguished from alimony) within the meaning of Section 22(k) of the Internal Revenue Code of 1939, with the result that this amount is income taxable to the husband rather than to the wife.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes (Section 22(k) and Section 23(u) of the Internal Revenue Code of 1939) and regulations (Section 29.22(k)–1 and Section 29.23 (u)–1 of Treasury Regulations 111) are set forth in the Appendix, *infra*, pp. 35–37.

STATEMENT

The taxpayer and his wife [1] were divorced on April 27, 1951.[2] On April 16, 1951, in anticipation of the divorce, the parties entered into a settlement agreement (subsequently ratified by the divorce court),

[1] "Husband" and "wife" are used in this brief to include divorced spouses.

[2] The date of the interlocutory decree. The final decree was entered on November 5, 1952. (R. 12.)

the purpose of which, as stated in paragraph (d) of the preamble, was (R. 10):

> * * * to settle for all times their respective property rights, interests, duties and obligations with respect to each other, and to arrange by agreement for the making of periodic payments to the wife as and for the maintenance and support for her and the aforesaid children of the parties, in discharge of the husband's legal obligations arising out of, or in connection with the marital and family relationship bebetween the parties * * *.

The agreement provided that the wife "shall have the care, custody and control" of the three children (Judy, age 13; Joan, age 11; and Jay, age 9 (¶ 10).[3] By paragraph 11 of the agreement, the husband agreed "to pay the wife for the support and maintenance of herself and the children of the parties" stated percentages of his gross income, subject to maximum limitations. (R. 10–11.)[4] The husband additionally agreed to pay any extraordinary medical expenses of the children (¶ 11(f), R. 11). Paragraph 11(i) provided (R. 11):

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[3] The agreement, Exhibit 1, is not set out in full in the printed record but is included in the original record filed with the Clerk.

[4] Both the percentages and the limitations declined during the years 1951–1953 but thereafter became fixed. For the balance of 1951, the payments were to be 50% of the husband's gross income, not to exceed $50,000; for 1952 and 1953, 25%, not to exceed $45,000; for 1954 and thereafter, 20%, not to exceed an amount which would net, after income taxes paid by the wife, $15,600.

(i) All payments herein specified shall cease upon the death of the husband or the wife or upon the remarriage of the wife, whichever shall first occur. It is expressly agreed that the wife shall not have any claim against the estate of the husband, should he predecease her, for any sums payable hereunder, except such sums as may have been due and payable to her pursuant to the terms hereof prior to his death. In the event that any of the children of the parties hereto shall marry, become emancipated, or die, then the payments herein specified shall on the happening of each such event be reduced in a sum equal to one-sixth of the payments which would thereafter otherwise accrue and be payable in accordance with the terms and provisions hereof.

The husband was required, until January 1, 1954, to name the wife as beneficiary to the extent of $20,000 in insurance policies on his life and was required, so long as he was obligated by law or agreement to support them, to name the children as beneficiaries to the extent of $30,000 (¶ 8(e), R. 7–8). In the division of property, the husband gave the wife the family residence, two automobiles, her personal effects, $10,000 in cash, and any bank accounts in her name (¶ 7). The husband agreed to pay the wife's legal fees incurred in the negotiation of the settlement except for the services rendered in connection with the "amount of support and maintenance payable by the husband to the wife in discharge of his obligation to support and maintain said wife and children" (¶ 12).

The taxpayer made periodic payments to the wife, under the agreement, totaling $23,000 in 1951 and $39,500 in 1952. On his income tax returns for those years, he claimed deductions for the entire payments under Sections 23(u) and 22(k) of the Internal Revenue Code of 1939. The Commissioner disallowed one-half of each deduction on the ground that the agreement fixed that part of the payments "as a sum which is payable for the support of minor children" within the meaning of Section 22(k) and hence not deductible under Section 23(u). (R. 12.) The Tax Court, in deficiency proceedings, upheld the Commissioner's determination. (R. 9–17.) The Court of Appeals reversed, holding that the agreement did not fix that amount as a sum "payable for" child support within the meaning of the statute. (R. 19–26.)

SUMMARY OF ARGUMENT

Sections 22(k) and 23(u) of the 1939 Code changed the rule established by prior case law and provided that the wife shall be liable for taxes on periodic payments made by the husband, pursuant to a separation or divorce decree, in satisfaction of his marital or family obligations. There was an important exception: The husband, rather than the wife, is taxable on

> that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband.

This case involves the interpretation of the statutory exception.

The settlement agreement here provides that the periodic payments to be made to the wife are for her support and for the support of the minor children. It also provides that there shall be a reduction of the payments by one-sixth upon the death, marriage or emancipation of each of the three children of the marriage. It does not require the wife to spend a specific sum on each of the children; she is limited only by her general duty to provide adequately for each of them.

The court below has held that the statutory exception is not satisfied, and the wife is obligated to pay income tax on the entire amount of support money received from the husband, because the instrument does not fix a specific amount which the wife is *required* to use *solely* for child support. The Commissioner's view, followed administratively since the adoption of the statute and supported by the Tax Court and by the weight of appellate decisions, is that the provision admits of a less rigorous interpretation. In the First Circuit's words (*Metcalf* v. *Commissioner*, 271 F. 2d 288, 291–292), we believe "the proper rule to be that it is sufficient if the parties, by their agreement, have shown a clear intention to distinguish in the periodic payments between what is paid to the wife because of her undertaking to support the children, and what is for herself, independent of that undertaking."

It is not necessary to read the words "amount * * * payable for" child support as requiring a provision in the instrument which deprives the wife of all discretion in allocating money within her family group. An amount may be said to be fixed for child support, within the contemplation of the taxing statute, if the instrument shows that the parties have drawn an ascertainable line as between the amount paid to the wife in recognition of her right of support and an amount paid in recognition of the children's needs. Intrinsic support for this interpretation is found in a succeeding sentence of the statute which provides that if the husband's total payment is less than the amount prescribed in the agreement, it shall be considered a payment for child support to the extent that a sum is payable for that purpose. This statutory presumption suggests a congressional purpose to relieve the wife of the tax burden on child support money to the extent that there is a practicable means of doing so without relieving her of the duty to pay taxes on alimony payments.

The legislative history, though not conclusive, suggests the same approach. Congress' primary aim was to change the rule in relation to alimony payments. Under prior law, the husband was generally liable for the amounts paid as alimony, but there was an exception in cases where the decree, the settlement agreement and state law operated to discharge the husband. Congress, anxious to avoid the inconsistencies which resulted from reference to state law, decided to place upon the wife the obligation to pay taxes upon alimony. At the same time, however, it was apparently

of the view that the husband, in fairness, should pay taxes on any amount paid to the wife in discharge of his obligation to support the minor children. The practical problem was one of administration: How was the Commissioner to allocate if single periodic payments were made for a dual purpose? Congress' answer was that an allocation should be made if the instrument provided a means of designating a specific portion of the payment as made in recognition of the obligation of child support. We find no indication in the legislative history that the designation would be deemed defective in the absence of an enforcible promise by the wife to use the designated sum solely for the children.

The Commissioner's interpretation was uniformly accepted by the courts in the years preceding 1954, when the statute was reenacted without significant change. There is thus implied congressional approval. A further factor of some weight is that many tens of thousands of settlement agreements were negotiated before any conflict portended. Doubtless, many of the parties to these agreements relied upon what was, until recently, regarded as a settled rule.

A further objection to the Second Circuit's approach is that under it the wife will almost invariably be required to pay taxes on money intended for use as child support, even though there appears to be a reasonably adequate basis for segregating that sum from alimony payments. It is relatively rare that a settlement agreement expressly states that the amount to be paid by the husband for child support must be used by the wife *solely* for the support of the children,

without discretion on the wife's part to decide if a certain use of a part of the money for her own benefit will also benefit the children. The tone of the legislative history does not suggest that the wife should have to pay taxes on the entire amount of support money in all but the most exceptional instances.

There is still another objection. In order to determine whether a settlement agreement restricts a wife so that she may use a designated portion of the money *only* for purposes of child support, one must make a prognosis of what the local divorce or equity court would hold. Yet it is clear that the 1942 legislation was largely prompted by a desire to avoid the difficulties, uncertainties and inconsistencies which inhere in that method of decision.

ARGUMENT

FOR AN AMOUNT TO BE "FIXED" BY A SETTLEMENT AGREEMENT AS "PAYABLE FOR" CHILD SUPPORT WITHIN THE MEANING OF SECTIONS 22(k) AND 23(u) OF THE INTERNAL REVENUE CODE OF 1939, IT IS SUFFICIENT THAT THE TERMS OF THE AGREEMENT, CONSIDERED AS A WHOLE, INDICATE THE AMOUNT WHICH THE HUSBAND UNDERTAKES TO PROVIDE FOR CHILD SUPPORT; IT IS UNNECESSARY TO DETERMINE WHETHER THE TERMS OF THE AGREEMENT IMPOSE AN ENFORCIBLE OBLIGATION UPON THE WIFE TO USE THAT AMOUNT EXCLUSIVELY FOR THE CHILDREN

A. INTRODUCTORY

Sections 22(k) and 23(u) of the Internal Revenue Code of 1939[8] (Appendix, *infra*, pp. 35–36) provide, with one exception, that all periodic payments in dis-

[8] Sections 71 and 215 of the 1954 Code are substantially identical.

charge of marital or family obligations made pursuant to a separation or divorce decree or agreement shall be taxable to the wife and deductible by the husband. The exception is that the wife is not taxable on, and the husband may not deduct,

> that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband.

Looking to the terms of the instant agreement, as the statute directs, one finds that it contains the following elements:

> (a) Some part of the periodic payments to be made by the husband to the wife are required to be used for the support of the children. The agreement provides that the payments to be made to the wife are "for the support of herself and the children," and the wife could no doubt be held accountable if she failed adequately to provide for the children out of the payments.
>
> (b) The total specified payments to the wife are to be reduced by one-sixth upon the death, marriage, or emancipation of each of the three children. Thus a specific part of the payments (one-half) is made terminable upon events which would likewise terminate the husband's duty at law to support the children.
>
> (c) The agreement does not require the wife, while receiving the total payments and supporting the children, to use this one-half *solely* for the support of the children. She is left free, so far as the terms of the agreement are concerned,

> to use the total amount as she sees fit, and in whatever proportions she deems appropriate, under the changing circumstances, limited only by her general duty adequately to provide for the children.

The court below, perhaps supported by the Sixth Circuit,[6] held that an agreement fixes an amount payable for child support within the meaning of the statute only if it fixes an amount which the wife is *required* to use *solely* for child support. Thus, the court, referring to its two previous decisions on the subject,[7] reiterated its statement in *Weil* v. *Commissioner*, 240 F. 2d 584, 588 (which was not necessary to the decision in that case), "that sums are 'payable for the support of minor children' when they are to be used for that purpose only" and that, "[a]ccordingly, if sums are to be considered 'payable for the support of minor children,' their use must be restricted to that purpose and the wife must have no independent beneficial interest therein." (R. 22.) Although conceding that the settlement agreement involved in the present case requires the wife to use the payments "to some extent" to support the children, the court below held (R. 23–24) that no amount was

[6] The opinion of the Sixth Circuit in *Budd* v. *Commissioner*, 7 T.C. 413, affirmed *per curiam*, 177 F. 2d 198, seems clearly contrary to the Second Circuit's view, which was first expressed in *Weil* v. *Commissioner*, 240 F. 2d 584, certiorari denied, 353 U.S. 958. However, the Sixth Circuit's later opinion in *Deitsch* v. *Commissioner*, 249 F. 2d 534, seems to follow the Second Circuit's view.

[7] *Weil* v. *Commissioner*, *supra*; *Hirshon's Estate* v. *Commissioner*, 250 F. 2d 497.

fixed as payable for child support because the wife "is to be free to use her judgment in allocating the collective unit among her children and herself" and has "discretionary power" under which "she is ordinarily free to allocate the payments as she thinks best, from time to time, spending on herself what she may think will in the end be for the best of the group." Noting that in *Metcalf* v. *Commissioner*, 271 F. 2d 288, the First Circuit had stated that "it is highly impractical, if not impossible, to segregate every expense from day to day so that the parent has 'no independent beneficial interest therein,'" the court below agreed, but stated that in its view the language of the statute cannnot be "recast so freely" as to permit a construction that amounts are fixed as payable for child support when the wife has a power of allocation as between herself and the children (R. 23). In short, the Second Circuit interprets the provision relating to child support payments as an exception in favor of the wife which has operative effect only if the settlement agreement imposes upon the wife an enforcible obligation to use a specified amount solely for child support.

In contrast, the First, Seventh, and Ninth Circuits (with the First and Ninth Circuits expressly disapproving the Second Circuit's view as previously reflected in *Weil*) have held that a settlement agreement fixes an amount payable for child support if, considering its terms as a whole, it identifies a sum which may fairly be deemed support money for the children rather than alimony for the wife. See *Metcalf* v. *Commissioner*, 271 F. 2d 288 (C.A. 1st);

Eisinger v. *Commissioner*, 250 F. 2d 303 (C.A. 9th), certiorari denied, 356 U.S. 913; *Mandel* v. *Commissioner*, 185 F. 2d 50 (C.A. 7th); *Mandel* v. *Commissioner*, 229 F. 2d 382 (C.A. 7th); *Joslyn* v. *Commissioner*, 230 F. 2d 871 (C.A. 7th). The Third Circuit has also applied this rule. See *Feinberg* v. *Commissioner*, 198 F. 2d 260, 263 (C.A. 3d). In the view of these circuits (which we support), a settlement agreement satisfies the statute if it contains language which (1) reflects a duty on the part of the wife to support the children; (2) specifies that the periodic payments to be made by the husband to the wife are for both the wife and the support of the children; and (3) provides a means of calculating the amount which the husband earmarked for the children.

Before turning to the precise statutory language, the legislative history and the relevant decisions, it may be well to focus upon the special problem with which Congress was dealing. Assume, for the moment, that Congress proposed to change pre-existing law so as to make the wife rather than the husband liable for income tax on sums paid to the wife as alimony; that Congress did not, however, desire to impose this burden on the wife in relation to sums paid by the husband for the support of minor children of the marriage; and, finally, that Congress recognized that in practice single periodic payments are commonly made to accomplish both purposes (i.e., support of the wife and support of the children). In this situation, a plausible solution, both from the standpoint of the parties and that of administration of the revenue, is

to afford relief to the wife whenever the husband-wife settlement instrument makes a designation of the amount intended for child support in terms sufficiently clear so that the Commissioner is enabled, as a practical matter, to segregate that amount from alimony. As we indicate in the sections of the brief which follow, that, we believe, was the basic approach which Congress adopted.

B. THE STATUTORY LANGUAGE

Sections 22(k) and 23(u) of the 1939 Code (which have similar counterparts in the 1954 Code) relate to periodic payments made by the husband to the wife in pursuance of a decree or written instrument incident to a divorce or separation and "in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband * * *." We emphasize at the outset, therefore, that what we are here concerned with is the discharge of a legal obligation of the husband through payments to the wife.

In combination, Sections 22(k) and 23(u) make each periodic payment by the husband to the wife taxable to the wife and deductible by the husband, with the following exception (contained in Section 22(k)):

> This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband. * * *

It should be noted that the statute deals with but one periodic payment to the wife, rather than two separate payments for alimony and child support, and that the exception in relation to child support is for the "part" of that one payment which the "terms" of the settlement agreement "fix" as a sum "which is payable for the support of minor children of such husband." As to this "part," we think it may be said that the "terms" of an agreement "fix" a "sum" for child support if the amount is clearly ascertainable and the purpose is fairly manifest from the agreement.

In other words, it is not necessary, in our view, to read the statutory language as requiring the Commissioner to determine whether the wife has made an enforcible promise to use a specified share of the money for the children, i.e., a promise which the local divorce court would specifically enforce through its equity powers. We believe that Congress has provided, for tax purposes, a more flexible standard: whether the instrument shows a sufficiently clear purpose to earmark or allocate so that a designated portion may fairly be said to represent alimony and another portion to represent child support money.

The sentence which immediately follows the language directly in issue here sheds light on the Congressional purpose in relation to child support payments. It reads:

> In case any such periodic payment is less than the amount specified in the decree or written instrument, for the purpose of applying the preceding sentence, such payment, to the ex-

> tent of such sum payable for such support, shall be considered a payment for such support. * * *[8]

In other words, if the husband's payment is less than the total which he is supposed to pay for both alimony and child support, the payment will be considered child support for tax purposes. This provision obviously favors the wife where there is a question whether a payment by the husband represents alimony or child support, since she pays no tax on amounts payable for the latter purpose. It suggests, therefore, that the Second Circuit's view, which would allow the wife a benefit only in the relatively rare case when the instrument clearly deprives the wife of all discretion concerning use of the payments, is out of keeping with the Congressional purpose. Cf. *Cohan* v. *Commissioner,* 39 F. 2d 540, 543–544 (C.A. 2d).

C. THE LEGISLATIVE HISTORY

The legislative history of Sections 22(k) and 23(u) is not particularly illuminating in relation to the provision covering child support payments. It does show, however, that these sections were enacted in an effort to achieve uniformity of application with respect to the taxation of alimony payments. Also, it indicates that in excepting child support payments from taxation to the wife and making them taxable to the husband (by denying him a deduction), Congress' only concern was that a specific amount be designated as child support payments in the settle-

[8] For applications of this sentence, see *Weil* v. *Commissioner*, 23 T.C. 630, reversed on another ground, 240 F. 2d 584 (C.A. 2d).

ment agreement (apparently because no distinction between alimony and child support payments could be satisfactorily made by other means).

Prior to the enactment of Sections 22(k) and 23(u), there was no statute covering alimony. As a general rule, the husband was taxable on the alimony payments on the principle, enunciated by this Court in *Douglas* v. *Willcuts*, 296 U.S. 1, that payments made from an alimony trust to a divorced wife under a decree of alimony, being in discharge of a continuing obligation of the husband to support his former wife, are income to the husband. This principle was, of course, equally applicable to child support payments (if not more so).[9] An exception was recognized, however, for cases where the decree, the settlement agreement and state law operated to discharge the husband completely from the obligation of support. *Helvering* v. *Fitch*, 309 U.S. 149; *Helvering* v. *Fuller*, 310 U.S. 69; *Helvering* v. *Leonard*, 310 U.S. 80; *Pearce* v. *Commissioner*, 315 U.S. 543. To show a full discharge of the obligation (as opposed to a continuing obligation), the husband had to prove, by clear and convincing evidence, that under state law the divorce court did not retain the power to alter or revise the amount payable by him. *Ibid.* Because of the many variations in state law, the tax consequences proved un-

[9] See the following cases in which this Court reversed the decisions of the Courts of Appeals on the authority of *Douglas* v. *Willcuts*, *supra*; *Schweitzer* v. *Commissioner*, 75 F. 2d 702 (C.A. 7th); 296 U.S. 551; *Commissioner* v. *Stokes*, 79 F. 2d 256 (C.A. 3d); 296 U.S. 551; *Helvering* v. *Coxey*, 79 F. 2d 661 (C.A. 3d); 297 U.S. 694. See, also, *Helvering* v. *Stuart*, 317 U.S. 154, 170–171.

certain and inconsistent. Such was the situation when this Court intimated that Congress had "authority to design a different statutory scheme applying uniform standards for the taxation of income of the so-called alimony trusts." *Helvering* v. *Fuller, supra,* 310 U.S. at 75.

Congress responded promptly. In 1941, the year following the *Fitch, Fuller* and *Leonard* decisions, an amendment was proposed to add Sections 22(k) and 23(u) to the Code. The hearings, Senate debates, and the report of the Ways and Means Committee on the proposed amendment all suggested a change in the law so that the tax on alimony (but not child support payments) would be paid by the wife, in part because of the hardship to the husband, but principally to achieve uniformity.[10] Action on the proposed amendment was deferred by the conference committee "with the understanding that it will be considered in a later bill dealing with administrative matters."[11] Hear-

[10] See House Hearings, Revenue Revision of 1941, 77th Cong., 1st Sess., pp. 1009–1010; Senate Hearings, Revenue Act of 1941, 77th Cong., 1st Sess., pp. 750, 1469; S. Rep. No. 673, Part 1, 77th Cong., 1st Sess., pp. 32–33 (1941–2 Cum. Bull. 466, 491–492); Senate Debate, 87 Cong. Rec. (Part 7) 7257, 7267.

It was specifically stated in the Senate Finance Committee report (S. Rep. No. 673, *supra*) that the amendments were "designed to remove the uncertainty as to the tax consequences of payments made to a divorced spouse out of the net income of so-called irrevocable alimony trusts, arising from the recent Supreme Court decisions in *Helvering* v. *Fitch* (1940) (309 U.S. 149), *Helvering* v. *Fuller* (1940) (310 U.S. 69), and *Helvering* v. *Leonard* (1940) (310 U.S. 80), which decisions make the test of whether such income is taxable to the husband the existence of a continuing legal obligation under State law."

[11] H. Conference Rep. No. 1203, 77th Cong., 1st Sess., p. 11 (1941–2 Cum. Bull. 509, 512.)

ings were again held the following year, at which the Treasury suggested adoption of the previous proposal as a "fair solution" to the problem.[12] In the pertinent committee reports it was again stressed that the bill "will produce uniformity * * * regardless of variance in the laws of different States * * *."[13] The amendment, contained in Section 120(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, was passed and Sections 22(k) and 23(u) were added to the 1939 Code.

There was no discussion in any of the hearings, debates or committee reports as to whether the taxability of amounts paid by the husband for child support (in contrast to payments for the wife's support) would depend upon state law. Since the Congressional aim was to produce uniformity of application as to alimony payments, it may be presumed, however, that Congress also intended that the part of the statute in issue here should be given a uniform application. (The Second Circuit's interpretation, we argue *infra*, will produce a lack of uniformity.)

As to child support payments, Congress indicated merely that it did not intend to tax the wife if the payments were determinable in amount. Requiring a designation of amount was, of course, necessary, since there would otherwise be no satisfactory basis for differentiating between alimony and child support payments. In relation to the latter, the amendment

[12] House Hearings, Revenue Revision of 1942, 77th Cong., 2d Sess., p. 92; see also, *ibid.*, p. 624.

[13] H. Rep. No. 2333, 77th Cong., 2d Sess., p. 72 (1942-2 Cum. Bull. 372, 427); S. Rep. No. 1631, 77th Cong., 2d Sess., p. 88 (1942-2 Cum. Bull. 504, 568).

proposed in 1941 as Section 22(k) of the 1939 Code stated (H.R. 5417, Section 117, 77th Cong., 1st Sess.):

> This subsection shall not apply to that part of any such periodic payment which, by the terms of the decree or written instrument, is specifically designated as a sum payable for the support of minor children of the spouses. * * *

In explaining this part of the proposed amendment, the pertinent committee report [14] simply drew a distinction between such a case and one where the periodic payments are for the support of both the wife and minor children "without such specific designation of the portion for the support of such children," in which event "the whole of such amounts are includible in the income of the wife * * *." Action was deferred on the entire amendment, as already noted. The amendment as submitted the following year (H.R. 7378, 77th Cong., 2d Sess.) used the word "fix" instead of "specifically designated". However, the child support provision was explained in the committee reports in the same manner as the amendment proposed in 1941,[15] except that the Ways and Means Committee report [16] also stated that—

> * * * the portion of such payments *going to* the support of minor children of the husband does not constitute income to the wife nor a deduction to the husband. * * * [Italics supplied.]

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[14] S. Rep. No. 673, *supra*, p. 35 (1941-2 Cum. Bull. at 493-494).

[15] See H. Rep. No. 2333, *supra*, pp. 73-74 (1942-2 Cum. Bull. at 429; S. Rep. No. 1631, *supra*, p. 86 (1942-2 Cum. Bull. at 570).

[16] H. Rep. No. 2333, *supra*, p. 46 (1942-2 Cum. Bull. at 409).

The lack of an explanation for the change, in 1942, in the language of the proposed amendment probably resulted from the fact that a member of the staff of the Office of the Legislative Counsel of the House of Representatives had explained in Senate hearings that the alimony provision had been revised with "a little more streamlined language" and that [17]—

> If an amount is *specified* in the decree of divorce *attributable* to the support of minor children, that amount is not income of the wife * * *. If, however, that amount paid the wife includes the support of children, but no amount is specified for the support of the children, the entire amount goes into the income of the wife * * *. [Italics supplied.]

Two observations may be made in connection with this legislative history. One is that the words "specifically designate," which were used most often in the committee reports, and the statutory word "fix" do not necessarily require an express statement that "x" dollars are to be paid for child support. The terms of a settlement agreement "fix" an amount payable for child support if they "direct unwaveringly" to, or "make definite and settled", the amount payable therefor.[18] The terms of a settlement agreement "specifically designate" an amount as payable for child support if they "mark out and make known * * * in a definite manner" or "with exactness and precision" the amount which is payable for

[17] Senate Hearings, Revenue Act of 1942, 77th Cong., 2d Sess., p. 48.

[18] See definition of "fix" in Webster's New International Dictionary (2d ed.).

child support.[19] It seems apparent that Congress was not concerned with *how* the "terms" of the settlement agreement "fix" the amount payable for child support, but only that the amount thereof be reasonably ascertainable.

In addition, the legislative history is important for what it does *not* show. Congress expressed no concern over the actual use by the wife of child support payments. It indicated no purpose to qualify the wife's exemption from tax on child support payments by exempting her *only* on the amount, if any, which she was legally obligated to use solely for the support of the children. Indeed, Congress did not even distinguish between (1) an amount which the husband was to pay for child support and (2) an amount which the wife was legally obligated to use solely for child support. It took a simple approach; it concerned itself only with a requirement that there be a sufficient designation of the amount which was being earmarked for child support.

D. THE ADMINISTRATIVE INTERPRETATION AND THE COURSE OF JUDICIAL DECISION

As noted earlier, Sections 22(k) and 23(u) were added to the Code in 1942.[20] Throughout the entire period since that time, the Commissioner has consistently urged the interpretation which we support here. Until the date of the decision below, the results

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[19] See definitions of "specifically" and "designate" in Webster's New International Dictionary (2d ed.).

[20] By Section 120(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798.

reached in individual cases have been consistent with our view of the statute, although in several of these (principally in the Second Circuit) the rationale has not been.

The Treasury Regulations have never adopted the view that for a sum to be "payable for" child support within the meaning of the statute it must affirmatively appear that the wife has made an enforcible promise to use the designated amount exclusively for that purpose. From the beginning, the Regulations have implicitly assumed, as did the committee reports explaining the legislation (see *supra*, pp. 20–21), that it was enough if the instrument afforded a sound basis for inferring that a specific portion of the husband's payments was designed to serve as support for the minor children rather than as alimony for the wife.[21]

The first significant case on the subject was decided by the Tax Court in 1946: *Budd* v. *Commissioner*, 7 T.C. 413, affirmed, 177 F. 2d 198 (C.A. 6th). In that case, there was no specific provision as to the amount payable by the husband for child support but there was, among other things, a provision for a reduction in the amount of the payment to the wife when the minor son died or became 21 years of age. The Tax Court held that "[a]ny adequate consideration of the problem here presented requires a con-

[21] See Treasury Regulations 103, Sec. 19.22(k)–1, as added by T.D. 5194 (1942–2 Cum. Bull. 53); Treasury Regulations 111, Sec. 29.22(k)–1, Appendix, *infra*, pp. 36–37 (originally issued October 26, 1943); Treasury Regulations 118, Sec. 39.22(k)–1 (d); Treasury Regulations on Income Taxes (1954 Code), Sec. 1.71–1(e).

struction of the agreement as a whole * * *" and that, so considered, it was "apparent" that, of the $6,000 paid by the husband to his former wife in the taxable years pursuant to the separation agreement, the sum of $2,400 represented an amount fixed by the terms of the agreement "as a sum payable for the support of petitioner's minor child * * *." (7 T.C. at 417.) This decision was affirmed by the Sixth Circuit in a *per curiam* opinion (177 F. 2d 198), the Court of Appeals stating that it agreed with the Tax Court "that in considering the separation instrument as a whole it becomes clear" that $200 a month ($2,400 a year) "is earmarked for the support of the petitioner's minor son."

Since that time, the Tax Court has consistently applied the *Budd* interpretation of the statute in numerous cases [22] (on some occasions so liberally that

[22] *Moitoret* v. *Commissioner*, 7 T.C. 640; *Chapin* v. *Commissioner*, decided July 28, 1947 (1947 P-H T.C. Memorandum Decisions, par. 47,224); *Leslie* v. *Commissioner*, 10 T.C. 807; *Mandel* v. *Commissioner*, decided May 6, 1949 (1949 P-H T.C. Memorandum Decisions, par. 49,105), affirmed, 185 F. 2d 50 (C.A. 7th); *Fleming* v. *Commissioner*, 14 T.C. 1308; *Newcombe* v. *Commissioner*, decided February 19, 1951 (1951 P-H T.C. Memorandum Decisions, par. 51,045), affirmed on another point, 203 F. 2d 128 (C.A. 9th); *Swallen* v. *Commissioner*, decided May 22, 1951 (1951 P-H T.C. Memorandum Decisions, par. 51,149); *Hicks* v. *Commissioner*, decided June 19, 1953 (1953 P-H T.C. Memorandum Decisions, par. 53,216); *MacKay* v. *Commissioner*, decided January 26, 1954 (1954 P-H T.C. Memorandum Decisions, par. 54,032); *Seltzer* v. *Commissioner*, 22 T.C. 203; *Weil* v. *Commissioner*, 22 T.C. 612, modified, 23 T.C. 630, affirmed in part and reversed as to this point, 240 F. 2d 584 (C.A. 2d), certiorari denied, 353 U.S. 958; *Neuwahl* v. *Commissioner*, decided July 21, 1954

it was reversed on appeal).[23] The first suggestion of disagreement in the Courts of Appeals was in 1957, fifteen years after the enactment of the statute, when the Second Circuit decided *Weil* v. *Commissioner*, 240 F. 2d 584, certiorari denied, 353 U.S. 958. In the interim, the Sixth and Seventh Circuits (*Budd* v. *Commissioner*, 7 T.C. 413, affirmed *per curiam*, 177 F. 2d 198 (C.A. 6th); *Mandel* v. *Commissioner*, 185 F. 2d 50 (C.A. 7th)) followed the interpretation which had been adopted by the Tax Court—an inter-

(1954 P-H T.C. Memorandum Decisions, par. 54,206); *Joslyn* v. *Commissioner*, 23 T.C. 126, affirmed in part and in part reversed and remanded, 230 F. 2d 871 (C.A. 7th); *Gantz* v. *Commissioner*, 23 T.C. 576; *Ball* v. *Commissioner*, decided April 13, 1955 (1955 P-H T.C. Memorandum Decisions, par. 55,084); *Eisinger* v. *Commissioner*, decided February 29, 1956 (1956 P-H T.C. Memorandum Decisions, par. 56,048), affirmed 250 F. 2d 303 (C.A. 9th), certiorari denied, 356 U.S. 913; *Deitsch* v. *Commissioner*, 26 T.C. 751, reversed and remanded with directions, 249 F. 2d 534 (C.A. 6th); *Morsman* v. *Commissioner*, 27 T.C. 520; *Hirshon's Estate* v. *Commissioner*, 27 T.C. 558, reversed and remanded, 250 F. 2d 497 (C.A. 2d); *Boettiger* v. *Commissioner*, 31 T.C. 477; *Metcalf* v. *Commissioner*, 31 T.C. 596, affirmed, 271 F. 2d 288 (C.A. 1st); *Ashe* v. *Commissioner*, 33 T.C. 331, November 27, 1959, pending on appeal to C.A. 6th; *Haber* v. *Commissioner*, decided May 4, 1960 (1960 P-H T.C. Memorandum Decisions, par. 60,084), pending before the Fourth Circuit on the husband's appeal and before the Second Circuit on the Commissioner's protective appeal.

[23] See *Weil* v. *Commissioner*, 22 T.C. 612, reversed, 240 F. 2d 584 (C.A. 2d), certiorari denied, 353 U.S. 958; *Deitsch* v. *Commissioner*, 26 T.C. 751, reversed, 249 F. 2d 534 (C.A. 6th); *Hirshon's Estate* v. *Commissioner*, 27 T.C. 558, reversed, 250 F. 2d 497 (C.A. 2d). These reversals by the Second and Sixth Circuits were consistent in result with a proper application of the *Budd* rule, even though the opinions suggested disagreement with that rule.

pretation recently formulated in *Eisinger* v. *Commissioner*, 250 F. 2d 303, 308 (C.A. 9th), certiorari denied, 356 U.S. 913, as follows: [24]

> The general rule which we here approve is that when the settlement agreement, read as a whole, discloses that the parties have earmarked or designated or apportioned or allocated the payments to be made, *one part to be payable for alimony, and another part to be payable for the support of children,* with sufficient certainty and specificity to readily determine which is which, without reference to contingencies which may never come into being, then the "part of any periodic payment" has been fixed "by the terms of the decree or written instrument" and satisfies the statutes and regulations hereinbefore quoted. * * *

In the *Weil* case, the Second Circuit stated that it must appear from the agreement, read as a whole, that the wife is required to use the money in question solely for the support of minor children. On its facts, however, *Weil* was distinguishable from the prior cases [25] and the result reached there was a permissible one under the general rule which had been applied by the Tax Court and by the Sixth and Seventh Circuits (as the government pointed out in its brief in

[24] In addition to the decisions of the Sixth and Seventh Circuits in *Budd* and *Mandel*, the Third Circuit, although not discussing the matter in any detail, decided a case requiring application of the *Budd* and *Mandel* rule. See *Feinberg* v. *Commissioner*, 198 F. 2d 260, 263 (C.A. 3d).

[25] There was no provision in that settlement agreement for a reduction of payments to the wife upon the death, marriage or emancipation of the children.

opposition to certiorari in that case, October Term, 1956, No. 871, pp. 10–11).

Three other cases were decided in the same year. In *Deitsch* v. *Commissioner*, 249 F. 2d 534, the Sixth Circuit subscribed to language taken from *Weil*, but, at the same time, reaffirmed its prior decision in *Budd* on the ground that it involved facts (a reduction clause) which warranted the conclusion that a specific amount was "earmarked" for child support. As in *Weil*, the result reached in *Deitsch* was not inconsistent with the prior course of decision.[26] In *Hirshon's Estate* v. *Commissioner*, 250 F. 2d 497, involving an agreement substantially the same as the one in *Weil*, the Second Circuit, in a brief *per curiam* opinion, relied upon its *Weil* decision. That case, too, was distinguishable on its facts.[27] In *Eisinger* v. *Commissioner*, 250 F. 2d 303, certiorari denied, 356 U.S. 913, the Ninth Circuit expressly approved the general rule which had been followed in the prior cases (see *supra*, pp. 23–26), distinguished *Weil* on its facts but stated that it did not agree "with the generality of some of its language" (p. 306), and stated that it disagreed with *Deitsch*. Subsequently, the Tax Court distinguished all three decisions—*Weil*, *Deitsch* and *Hirshon's Estate*—on their facts, stating

[26] The provisions for reduction of the payments to the wife were inconsistent and it was therefore at least questionable whether the agreement made a clear allocation of the amount payable for child support.

[27] The agreement provided for a reduction in the amounts payable to the wife upon her remarriage but contained no provision reducing such payments upon the death, marriage or emancipation of the children if the wife did not remarry.

further that it did not understand those decisions to preclude the result being reached in the case before it. See *Metcalf* v. *Commissioner*, 31 T.C. 596, affirmed, 271 F. 2d 288 (C.A. 1st); see, also *Ashe* v. *Commissioner*, 33 T.C. 331, now pending on appeal to the Sixth Circuit.

The next Court of Appeals decision on the subject was that of the First Circuit in *Metcalf*, *supra*, where, as in the present case, the settlement agreement did not "in so many words" make an allocation between alimony and support payments but contained "an obvious per capita arrangement" for the reduction of the payments to the wife upon the death, emancipation or marriage of a child (p. 290). Stating that, viewed in terms of their facts, the "cases on this subject are not in such conflict as has been suggested" (p. 291), the court commented on the Second Circuit's interpretation of the statute as follows (pp. 291–292):

> [W]e cannot feel that Congress, in using the phrase "payable for the support of minor children," intended such rigidity of restriction. Where a home is run as a unit, as is contemplated in the case of a parent having custody of minor children, it is highly impractical, if not impossible, to segregate every expense from day to day so that the parent has "no independent beneficial interest therein." We believe the proper rule to be that it is sufficient if the parties, by their agreement, have shown a clear intention to distinguish in the periodic payments between what is paid to the wife because of her undertaking to support the chil-

> dren, and what is for herself, independent of that undertaking. * * *

At about the same time, the Internal Revenue Service, having been requested to state its position with respect to *Weil* and *Eisinger,* issued a press release (Technical Information Release 119, dated December 16, 1958), and subsequently a revenue ruling based on the press release (Rev. Rul. 59–93, 1959–1 Cum. Bull. 22). The latter states:

> The Service will follow the decision of the United States Court of Appeals in the *Weil* case on this issue in cases involving similar facts and circumstances. However, in determining whether payments made under a divorce decree or separation agreement are to be treated as alimony or whether a portion is for the support of minor children, the Service will continue to follow its position as set forth in the rationale of the decision of the United States Court of Appeals in the *Eisinger* case. * * *

As appears from the above discussion, the consistent administrative practice and the weight of judicial authority support the rule which we are urging. It is significant, moreover, that there was no intimation of disagreement with this rule as of the time that Congress, in 1954, reenacted Sections 22(k) and 23(u) of the 1939 Code as Sections 71 and 215 of the 1954 Code, stating that the new provisions were substantially the same as existing law. H. Rep. No. 1337, 83d Cong., 2d Sess., pp. A–20 to A–21, A–62 (3 U.S. Cong. & Adm. News (1954) 4621, 4805, 4858). Since, at this point, the Tax Court had already interpreted the 1939

Code provisions in a number of cases and the rule which it had fashioned had been accepted in the two Courts of Appeals which had passed upon the matter, there is basis for inferring congressional approval. A further factor is entitled to weight. Tens of thousands of settlement agreements have been drafted since 1942. Many of the parties to these agreements have presumably placed reliance upon what seemed, until relatively recently, to be a settled rule.

E. OBJECTIONS TO THE SECOND CIRCUIT RULE

From all indications, it is relatively rare that a settlement agreement expressly states or plainly requires that the amount to be paid by the husband for child support must be used by the wife *solely* for the support of the children, without any discretion on the wife's part to decide that a certain use of a part of the money for her own benefit will also benefit the children. We assume, moreover, that, in the absence of a clear indication of an intent to impose such a legal obligation on the wife, the local state courts (the only courts having jurisdiction to effectuate the terms of the agreement) would be reluctant to impose any such restrictions on the wife's use of the child support money and to impose accounting requirements on her. See *Yates* v. *Yates,* 183 Misc. (N.Y.) 934, 937. If these assumptions are valid, the provisions of the Internal Revenue Code covering child support payments will have very limited application if the Second Circuit's interpretation is adopted. As a practical matter, the wife will almost invariably be required to

pay taxes on money intended for use as child support, even though there appears to be a reasonably adequate basis for segregating that sum from alimony payments. It would seem that such a rigorous interpretation should not be adopted unless the Court concludes that it is compelled by the statutory language, for it must be remembered (see *supra,* p. 17) that under the law as it stood prior to 1942 it was the husband who was liable for taxes on monies which he expended in discharge of his continuing obligation to support the children.

Another serious objection is that, in the absence of an unequivocal provision restricting the wife's use of the child support money, the Second Circuit's interpretation would make the application of the federal statute depend upon state law. For tax purposes, the rights and obligations of parties under a written instrument are determined under state law, but the effect of those rights is a federal question. *Blair* v. *Commissioner,* 300 U.S. 5, 9–11; *Helvering* v. *Stuart,* 317 U.S. 154, 162. The Second Circuit's interpretation allows room for construction of the settlement agreement as a whole (see *Weil* v. *Commissioner, supra,* p. 588), but requires a determination as to whether a legal obligation is imposed on the wife with respect to her use of the child support payments. It necessarily follows that, to apply the child support provision, state law must be considered. Even a cursory examination of state court decisions interpreting settlement agreements shows that the inter-

pretations vary widely.[28] In many instances, moreover, there may be no state court decision squarely in point. In that situation, the parties may have to meet the type of problem which existed at the time of the old "alimony trust" cases (see *supra*, p. 17), *i.e.*, that one or the other (husband or wife) must show, by clear and convincing evidence, that state law does or does not impose a legal obligation on the wife to use the support payments solely for the benefit of the children. The burdens of making such a showing are formidable. More than that, there would be the same

[28] For example, provisions for the reduction of periodic payments to the wife upon her remarriage or upon the emancipation, marriage or death of the children have been held to establish the portion of the payments which are for child support, contrasted with alimony, under the laws of Michigan and Washington, but not under the laws of New York, Georgia, and Texas. *Sturgis* v. *Sturgis*, 300 Mich. 438; *Stafford* v. *Stafford*, 18 Wash. 2d 775; *Anderson* v. *Anderson*, 27 Wash. 2d 122; *Nichols* v. *Nichols*, 306 N.Y. 490; *Yates* v. *Yates*, 183 Misc. 934 (N.Y.); *Blalock* v. *Blalock*, 214 Ga. 586; *Brodhead* v. *Brodhead*, 238 S.W. 2d 832 (Tex.). The differences in state law in this area are illustrated further by the holdings that a divorced or legally separated wife who receives sums for child support is considered a trustee for the child under the laws of Indiana and Georgia (*Corbridge* v. *Corbridge*, 230 Ind. 201; *Stonehill* v. *Stonehill*, 146 Ind. 445; *Thomas* v. *Holt*, 209 Ga. 133), whereas in Connecticut the possibility that, in the absence of an explicit trust provision the wife may use some of the money for purposes other than child support, is recognized (*Steinmann* v. *Steinmann*, 121 Conn. 498). Under Kentucky law, the wife has a right to use some of the funds designated for child support for her own maintenance (*Napier* v. *Napier*, 286 Ky. 452), since, with respect to an allowance for child support, the wife and children are considered as a unit (*Eaves* v. *Eaves*, 286 S.W. 2d 371 (Ky.); *Conlan* v. *Conlan*, 293 S.W. 2d 710 (Ky.)).

confusion and inconsistency of result which Congress was seeking to avoid when it enacted the 1942 legislation.

In summary, we readily agree that an explicit promise by the wife to use a designated sum exclusively for the minor children makes a clear case under the statute (albeit an atypical case). Our disagreement is with the conclusion that nothing short of a binding obligation on the wife will do. We believe that there are other cases in which a court may properly conclude, on the basis of the particular agreement or instrument, that there is an adequate basis for segregating (for tax purposes) alimony payments from child support money. Congress, we submit, has left room for a more flexible standard than that prescribed in the decision below.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. Sections 22(k) and 23(u) of the Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.), as added by § 120 of the Revenue Act of 1942, 56 Stat. 798, provide in part:

SEC. 22. GROSS INCOME.

* * * * *

(k) *Alimony, Etc., Income.*—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband. In case any such periodic payment is less than the amount specified in the decree or written instrument, for the purpose of applying the preceding sentence, such payment, to the extent of such sum payable for such support,

shall be considered a payment for such support. * * *

* * * * *

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(u) *Alimony, Etc., Payments.*—In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k) or section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection.

2. Sections 29.22(k)–1 and 29.23(u)–1 of Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939, provide in part:

SEC. 29.22(k)–1. *Alimony and Separate Maintenance payments—Income to Former Wife.*— * * *

* * * * *

(d) *Payments for support of minor children.*—Section 22(k) does not apply to that part of any periodic payment which, by the terms of the decree or the written instrument under section 22(k), is specifically designated as a sum payable for the support of minor children of the husband. The statute prescribes the treatment in cases where an amount or portion is so fixed but the amount of any periodic payment is less than the amount of the periodic payment specified to be made. In such cases, to the extent of the amount which would be payable for the support of such children out of the originally specified periodic payment, such periodic payment is considered a payment for

such support. For example, if the husband is by terms of the decree required to pay $200 a month to his divorced wife, $100 of which is designated by the decree to be for the support of their minor children, and the husband pays only $150 to his wife, $100 is nevertheless considered to be a payment by the husband for the support of the children. If, however, the periodic payments are received by the wife for the support and maintenance of herself and of minor children of the husband without such specific designation of the portion for the support of such children, then the whole of such amounts is includible in the income of the wife as provided in section 22(k). Except in cases of a designated amount or portion for the support of the husband's minor children, periodic payments described in section 22(k) received by the wife for herself and any other person or persons are includible in whole in the wife's income, whether or not the amount or portion for such other person or persons is designated.

* * * * *

Sec. 29.23(u)-1. *Periodic Alimony Payments.*—A deduction is allowable under section 23(u) with respect to periodic payments in the nature of, or in lieu of, alimony or an allowance for support actually paid by the taxpayer during his taxable year and required to be included in the income of the payee wife or former wife, as the case may be, under section 22(k). As to the amounts required to be included in the income of the wife or former wife, as the case may be, see section 29.22(k)-1. (For definition of husband and wife in such cases, see section 3797(a)(17).)

3. Sections 39.22(k)-1 and 39.23(u)-1 of Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939, effective January 1, 1952, are identical to the sections set out above.

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IN THE

Supreme Court of the United States

October Term, 1960

No. 376

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

—v.—

JERRY LESTER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR THE RESPONDENT

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Question Presented

The property settlement agreement between the taxpayer and his former wife provided that the taxpayer make periodic payments to his former wife of a large percentage of his gross income. These payments were to cease entirely upon the remarriage of his former wife regardless of the age, death or marriage of the children. The agreement also provided for a maximum payment to the wife which was also unchanged regardless of the age, death or marriage of the children. If the wife has not remarried, the agreement also provided for a reduction in the payment upon the emancipation, death or marriage of each of the children. It also provides for the wife to pay the taxes on the monies paid to her under the agreement. The question presented is whether this agreement fixes a portion of the periodic payment as "payable for" the support of the children within the meaning of Sections 22(k) and 23(u) of the Internal Revenue Code of 1939.

Statute Involved

Sections 22(k) and 23(u) of the Internal Revenue Code of 1939.

Statement

Jerry Lester and his former wife entered into a Separation Agreement on April 16, 1951. This agreement intended and provided that the wife was to pay the income tax on all monies received by her (R. 11, paragraph (d)). They were subsequently divorced, and the Separation Agreement was made part of the decree, and included therein. The Separation Agreement provides for payments to the wife of stated percentages of the husband's income (R. 10-11). The agreement further provides that all payments to the wife are to cease upon her remarriage, regardless of the ages of the children (R. 11, paragraph (i)). The agreement also provided that payments to the wife would be reduced by one-sixth in the event any of the children married, became emancipated, or died. Despite this percentage reduction, the maximum payments which the wife could receive were not reduced and remained constant. The agreement did not provide that any sum or portion of the payments to the wife was payable for the support of the children.

During 1951, Jerry Lester paid $23,000 to his former wife, and during 1952 he paid $39,000 to her. He deducted these payments on his income tax returns for those years under Sections 22(k) and 23(u) of the Internal Revenue Code of 1939. The Commissioner disallowed one-half of each deduction on the ground that that portion was payable for support of the children, although the agreement did not "fix any sum in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children * * *" (sec. 22(k) IRC 1939). This position was upheld by the Tax Court (R. 9-17), but reversed by the Court of Appeals (R. 19-25) in a well reasoned opinion by Judge Learned Hand, holding that the language of Section 22(k) plainly required that in order

to be treated as a payment for child support the agreement must fix a portion of the payment as support for the children, and that clearly the agreement here did not fix any portion as support for the children and therefore the entire amount of the payments was alimony and deductible by the husband.

Summary of Argument

Congress has provided in the Statute under consideration, Section 22(k), that in order for payments not to be treated as alimony the agreement must fix an amount or portion of the payment as being for the support of the children. It is clear that this agreement does not fix such an amount or portion, and that it is contrary to the intent and meaning of the Statute to attempt to read in such a fixing by reason of the fact that the amount of the payment is reduced when a child marries, dies, or reaches 21. Such a construction would defeat the purpose of the agreement which is to permit the mother to use and allocate the payments as she sees fit.

Furthermore, even if the Commissioner's position is upheld, that he can allocate the amount of such payments even where they are not specifically allocated, this case does not fall into that class of cases for the following reasons: even where there is an allocation, an intention to allocate must be shown, and the agreement under consideration here shows an intention not to allocate; where there is an allocation, the agreement must show a clear earmarking of amounts for support, and here there are varying provisions so that there cannot be said to be an allocation of an amount payable for support.

We submit that the reasoning of the Second Circuit was correct and should be affirmed, but even if this Court should disagree with that reasoning, the judgment below should be affirmed because this case is not one in which an allocation may be made even under the rule proposed by the Commissioner.

ARGUMENT

I. The Internal Revenue Code provides that for an amount of a periodic payment to be treated as payable for child support, it must be "fixed" by the settlement agreement as payable for that purpose.

Sections 22(k) and 23(u) of the Internal Revenue Code of 1939 are clear and unequivocal that payments to a former wife are alimony—reportable by the wife and deductible by the husband. The exception to this rule is where the agreement fixes a portion of such payment as being payable for the support of the children.

There is nothing in the Statute or the legislative history to suggest that Congress intended anything other than an exception where the amount was clearly allocated and set forth in the agreement. There is nothing to indicate that the Commissioner is free to decide that an amount is fixed for child support, when clearly it is not so fixed, by seeking to allocate amounts as payable for child support where certain payments may be reduced on the happening of specified events. As Judge Hand said in the opinion below (R. 23):

> "* * * That part of a 'periodic payment' that is not to be charged to the husband's gross income is only that which the 'written instrument' (shall) 'fix, in terms of * * * a portion of the payment, as a sum which is payable for the support,' etc. It by no means follows, because when a child dies or marries or reaches twenty-one the 'periodic payments' are diminished, that from the outset that child's support has been 'fixed' by the amount of the possible reduction. Indeed such a construction would defeat what is the basic meaning of such an agreement, for the mother is to be free to use her judgment in allocating the collective unit among her children and herself. It is true that it is assumed that she will use the payments to some extent to support the children, but we need not say that there could never be occasions when

> a court would overrule her discretion. In any case she is ordinarily free to allocate the payments as she thinks best, from time to time, spending on herself what she may think will in the end be for the best of the group. The fact that, when the group changes, the 'periodic payments' are reduced in a 'fixed' proportion does not indicate that meanwhile the wife's discretionary power has been limited. Indeed, we do not see why, if the existing allocation at the time of a child's death, marriage, or majority were to determine his proportion of the earlier payments, it does not follow that the wife's discretion is taken away altogether. Unless we have misapprehended its meaning, Congress intended to tax the wife on all the payments unless the agreement itself declared in what proportion she must allocate them to the children."

The argument of the Commissioner in its brief that Congress intended that an allocation should be made if the agreement "provided a means of designating" a portion of the payment as support (p. 8) and that he may allocate if "the instrument shows a sufficiently clear purpose to earmark or allocate" (p. 15) is simply not supported by the Statute. If Congress had intended to allow the Commissioner to allocate where he felt the agreement showed a "sufficiently clear purpose" it would have so provided. On the contrary it clearly provided that the agreement must "fix" such amounts for support. The agreement in this case clearly does not fix any amount for support of the children—it merely provides for alimony payments to the wife out of which she agrees to use an undeterminable amount to support the children.

As a matter of fact, the very language relied upon by the Commissioner in his brief, page 21, which was used to explain the Statute in the Senate hearings, illustrates that Congress conceived of the situation where an amount would be paid to the wife which would include support of the children without specifying any amount for their support, and

in that event "the entire amount goes into the income of the wife * * * ".[1]

Further, the report of the Senate Committee itself shows that it considered the situation where payments, whether directly or by trust, would be made to the wife for the support of herself and minor children without "specific designation," and in the following language it sets forth that the payments in that event are includible in the income of the wife:[2]

> " * * * If however the periodic payment and the trust income are received by the wife for the support and maintenance of herself and of minor children of the husband without such specific designation of the portion for the support of such children, then the whole of such amounts is includible in the income of the wife as provided in section 22(k) and in section 171."

Certainly if Congress intended the Commissioner to allocate where there was no "specific designation", or no amount was "fixed" in the agreement it would have provided so and not remained silent on the subject.

We respectfully submit that the Statute is clear and unequivocal and was correctly applied by the Court below since there was no allocation provided in the agreement, and to hold otherwise under the Statute would be the "disregard of plain language patently chosen with care" (R. 24).

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[1] " * * * If, however, that amount paid the wife includes support of children, but no amount is specified for the support of children, the entire amount goes into the income of the wife * * *." Senate Hearings, Revenue Act of 1942, 77th Cong., 2d Sess., p. 48.

[2] Senate Report No. 1631, 77th Cong., 2d Sess., p. 86.

II. The interpretation sought by the Commissioner will promote uncertainty, not certainty.

The Commissioner seeks to take upon himself the right to allocate payments to child support where the agreement itself does not made such an allocation. Thus, people who enter into such an agreement may not know the tax consequences for many years after the agreement is made. That many people have been caught in this trap is evidenced by the many cases on this subject and the many pending matters set forth by the Commissioner in his Petition for Certiorari. It seems apparent that they have relied on the wording of the Statute rather than upon Judicial decisions as contended by the Commissioner. This uncertainty would be avoided by the rule adopted by the Second Circuit, that is—where an agreement does not fix an amount as payable for child support the Commissioner may not allocate an amount to support by going over "the instrument with a fine-tooth comb to discover a figure which might be used as the basis for a division of the tax burden."[3] Thus, where parties have expressly fixed sums for support, they will be treated as such, and where no sums have been fixed, the Commissioner will be unable to allocate sums for support and frustrate the intention of the parties.

III. Even under the rule proposed by the Commissioner there would be no amount fixed by the agreement in this case.

A. There Was No Intention to Earmark any Amount for Support of the Children.

Even under the rule proposed by the Commissioner, he must find an intention to earmark a portion of the payments as support for the children before he can find such an earmarking.

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[3] *Weil v. Commissioner*, 240 F. 2d 584.

Here, there was clearly an intention not to earmark any portion of the payments as support for the children. Rather, the agreement clearly shows that the parties intended that the wife pay tax on all the money she received. This was done because she would get more money after taxes this way than if Mr. Lester were to pay tax on the money in a much higher bracket. In addition, the large percentage she received was based on his gross income—not his net income—so that it would have been financially impossible for him to pay the taxes with the amount of money he had left after paying his ordinary and necessary business expenses, which amounted to as much as 40% of his gross income. As a matter of fact one can easily foresee that the government itself would seek to overthrow such a situation where one gives away so much money that he does not have enough left to pay his tax.

Congress sought to avoid this result. In setting forth the purpose of the amendment to the Internal Revenue Code, the House Committee recognized that the former law did not allow a deduction to the husband for alimony payment, and that this result would work a great hardship in view of the high tax rates then being introduced.[4]

Furthermore, the agreement itself shows that it was the intention of the parties that Mrs. Lester pay the taxes on the money which she received. In paragraph 9 of the agreement, each agreed to file separate returns and pay his own tax. Further, in paragraph 11(d) (R. 20), it is provided that she receive a specified maximum amount after she pays the taxes.

Even the Tax Court at the trial recognized that the parties intended that there be no allocation and the wife pay taxes on all the money she received—but apparently

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[4] "* * * *. The increased surtax rates would intensify this hardship and in many cases the husband would not have sufficient income left after paying alimony to meet his income tax obligation * * *." House Report #2333, 77th Cong., 2d Sess., p. 46.

thought the Internal Revenue Code overrode that intention (R. 6). However, on the contrary, that Congress intended that the one who receives the money should pay the tax on it is shown by the House Ways and Means Committee in its report explaining the purpose and intent of the amendment as follows:[5]

> "These amendments are intended to treat such payments as income to the spouse actually receiving them or actually entitled to receive them and to relieve the other spouse from the tax burden upon whatever part of the amount of such payments is under the present law includible in his gross income."

It is therefore clear that there was no intention to fix any amount as payable for support of the children—but rather to pay one amount to the wife, she to pay the tax on the entire amount and assume support of the children, and that in such a situation Congress provided that the wife pay the tax on all of the money received by her.

B. The Cases Relied on by the Commissioner Hold That Only Such Amounts That Are Allocated for Support of the Children After the Remarriage of the Wife Are Not Deductible by the Husband. Here Since All Payments Cease Upon Remarriage of the Wife, They Are All Deductible by the Husband.

The rule sought to be applied by the Commissioner was established by the Tax Court. While in most of the cases, the amount of the reduction in payments was the same whether the reduction was on the wife's remarriage, or the children's marriage, emancipation or death, the Tax Court has clearly indicated that where there were reductions in different amounts for different contingencies, the amount of the payments which continued after the wife's remarriage would control. The rule was clearly set forth in *Fisher* v. *Commissioner*, 15 TCM 507.

In the *Fisher* case, the husband was required to pay $230 per month for the care, maintenance and support of

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[5] House Report #2333, 77th Cong., 2d Sess., p. 71. See similar language in Senate Report #1631, 77th Cong., 2d Sess., p. 83.

the wife and two children. After the children reach 21, he is obligated to pay $190 per month to the wife. If the wife should remarry prior to the children reaching 21, then the husband is obligated to pay $125 per month to support the children. The Court went on to say:

> "In considering the question of whether the separation agreement fixes the portion of the periodic payment as payable for the support of the children, the instrument must be construed as a whole. *We have held the amount set forth in an agreement for the support of the children upon the wife's remarriage represent the portion of the periodic payment that is payable for the support of the children, Robert Budd*, 7 T. C. 413 aff'd per curiam C. A. 6, 177 F. 2d 198 (38 AFTRA 549) *Beulah Weil*, 22 T. C. 612, *and cases cited.*
>
> "The question here is as to the portion of the $230 payment which the agreement earmarks as support for Samuel's minor children. *The sum which Samuel agrees to pay his wife after both children are no longer minors is unimportant.* As long as the children are both minors, the obligation is to pay $230 a month and the *remarriage provision identifies $125 of the monthly payment as children support.*" (emphasis added)

In the agreement under consideration, *all payments cease upon the remarriage of the wife, therefore, no part of the payments is identified as being for the support of the children*, and the entire amount is payment of alimony. As in the *Fisher* case, the amount by which payments are reduced when the children reach 21 is unimportant and does not indicate an allocation for support. It is the amount which is payable after remarriage which indicates an allocation for support, in our case this is nothing. Hypothetically, if our agreement provided that in the event the wife remarried, the husband were to pay $400 for the support of the children, then, under the rule of the *Fisher* case, the earmarking for support would be the $400 not the one-sixth by which payment was reduced when a child reaches

21. However, here it is provided that the husband pay nothing in the event the wife remarries, therefore, nothing is earmarked as support, and all the payments are alimony which is taxable income to the wife and tax deductible to Mr. Lester.[6]

It is interesting to note that this case, which presents the same issue as the present case in that there are different amounts allocated on different occasions is not cited by the Commissioner. However, all of the cases cited by him in his footnote on page 24 (except the three cases which were reversed),[7] stand for the ruling that the amount of the payment which the wife receives for support of the children after she remarries is the amount which may be held to be allocation for support prior to her remarriage.

Applying this rule to our case—since all payments cease upon the remarriage of the wife (paragraph i, R. 21) it is clear that there can be no allocation of monies as payable for support of the children prior to the remarriage.

C. There Are Varying Provisions for the Reduction of Amounts Payable Upon the Happening of Different Events.

The Commissioner seeks to reconcile *Deitsch* v. *Commissioner*, 249 F. 2d 534, *Weil* v. *Commissioner*, 240 F. 2d 584, cert. denied 353 U. S. 958 and *Hirshon's Estate* v. *Commissioner*, 250 F. 2d 497, with the rule he proposes on the ground that these cases contained varying provisions for

[6] We note that the Commissioner contended in the Court of Appeals that this view was rejected in the *Weil*, *Hirshon* and *Deitsch* cases *infra*. However he overlooked the fact that this is an alternating argument to the effect that if said cases are not approved, the agreement here would not contain an allocation even under the Tax Court ruling which he seeks to have this Court adopt.

[7] *Deitsch* v. *Commissioner*, 249 F. 2d 534, *Weil* v. *Commissioner*, 240 F. 2d 584, cert. denied 353 U. S. 958, and *Hirshon's Estate* v. *Commissioner*, 250 F. 2d 497.

reduction of payments, and hence it was not clear what amount could be allocated.[8]

If that be the rule, then it is equally unclear here for the following reasons: The payments are reduced by 1/6 upon the death, marriage or emancipation of each child, but they are stopped entirely upon the remarriage of the wife. Thus, if the wife remarried a month after the divorce the husband would have no payments to make even though all of the children were minors and unmarried. It is thus clear that there cannot be fairly said to have been a fixing of any amount as payable for support of the minor children.

That there is no amount fixed for support of the children is further shown by the fact that the agreement provides a maximum amount which the wife may receive regardless of whether or not the children are alive, married or emancipated—*i.e.*, $15,600 after the payment by her of taxes on amounts she receives (R. 20, paragraph 11(d)). Thus, if all of the children were killed in a disaster a month after this agreement was entered into, the wife would still receive the same amount of money as if they were alive.[9] Here again it is clear that there cannot fairly be said to be an allocation for support since she would receive the same amount whether or not she was supporting the children.

Therefore, if the *Weil*, *Hirshon* and *Deitsch* decisions *supra* are to be reconciled on the grounds of varying provisions, this case falls into the same category and the decision below should be affirmed.

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[8] Commissioner's Brief—p. 25, n. 27; p. 27, n. 26, 27.

[9] While the amount of each payment would be reduced, the maximum she could receive would be constant.

Summary

The decision by Judge Learned Hand is correct because the Statute provides that for an amount to be treated as payable for child support it must be "fixed" in the agreement, and no such sum was "fixed" in the agreement under consideration. Any other holding would leave taxpayers in a state of utter confusion and at the mercy of those interpreting the word "fixed".

Even if this Court accepts the rule proposed by the Commissioner, the judgment below is correct because no amount is fixed in this agreement even under that rule since (1) all payments cease upon the remarriage of the wife even though the children may be unmarried minors and (2) and the maximum amount she is to receive is never reduced by reason of the status of the children.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

LOUIS MANDEL,
LEONARD J. LEFKORT,
Attorneys for Respondent.

April, 1961.

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No. 376

In the Supreme Court of the United States

OCTOBER TERM, 1960

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JERRY LESTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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For the most part the taxpayer disregards the legal question of statutory construction and attempts to support the decision below simply by reference to provisions of the settlement agreement which he contends preclude a conclusion that a portion of his payments are being earmarked as payable for child support. In the record (pp. 7–8, 10–12) we printed what we considered to be the significant portions of the settlement agreement. Since the taxpayer's argument is so predominantly factual, we are printing the entire agreement (Exhibit 1) as an appendix to this brief.

1. The taxpayer's primary contention is that the amounts payable for the support of minor children

are not fixed by the settlement agreement because the agreement provides that all payments by the husband to the wife shall terminate upon the remarriage of the wife (Br. 9–12). That provision is really of no significance here. The settlement agreement states that it is to be construed and interpreted under and in accordance with the laws of the State of California (R. 8). Under California law, the primary obligation to support minor children is on the husband[1] and a minor child's right to support may not be barred by an agreement between husband and wife.[2] Indeed, there are various provisions in the present agreement in which the husband clearly recognizes his continuing obligation to support the children without regard to the agreement (R. 7–8, 10, 11). The clause on which the taxpayer relies is merely a termination clause, specifying an event which terminates alimony to the wife but as to any minor child merely leaves the arrangement for his support for future determination. We are here concerned only with the amount payable for child support during the effective period of the agreement.

This amount is reflected in the provision of the agreement which provides that the total of periodic payments to be made by the husband to the wife shall be reduced by one-sixth upon the death, marriage or emancipation of each child, a total of one-half for the three children. Prior to any such event, which in-

[1] Section 196 of the California Civil Code, as interpreted in *Metson* v. *Metson*, 56 Cal. App. 2d 328, 333, and *Newell* v. *Newell*, 146 Cal. App. 2d 166, 178.

[2] See *Allen* v. *Allen*, 138 Cal. App. 706; *Smith* v. *Smith*, 125 Cal. App. 2d 154; *Smith* v. *Smith*, 131 Cal. App. 2d 764.

cludes the taxable years involved here, the husband's continuing obligation to support all three children is satisfied by the payment of this one-half. Thus, during the time of full payments he receives the benefit from the portion paid for child support and is properly taxed on this amount. A reduction in the amount of payments comes about only when his obligation to support a child comes to an end, *e.g.*, when the child dies, marries or becomes emancipated, or when he more directly assumes his obligation under the law to support the children (*i.e.*, when and if the wife remarries).

2. Relying upon the provisions of the agreement relating to the *maximum* amount payable to the wife (par. 11), the taxpayer implies that the total payments to the wife would remain the same even if all of the children were killed in a disaster (Br. 12). But, as he apparently concedes (n. 9, Br. 12), the maximum payments in that event would be reduced 50 percent (to 25 percent the first year, to 12½ percent the second and third year, and to only 10 percent of his gross income after the third year). Since the reduction clause applies and reduces the amounts which "would thereafter otherwise accrue and be payable in accordance with the terms and provisions hereof," the agreement, in our view, likewise reduces the maximum amount payable. In any event, it is most unlikely (and certainly not contemplated by the agreement) that the wife "would receive the same amount whether or not she was supporting the children" (Br. 12).

3. The taxpayer asserts that the parties intended the wife to pay the tax on the child-support money, and that to tax him instead would work a hardship (Br. 8). But Congress has provided that the terms of the agreement control the incidence of the tax and, presumably, the agreement was written with the provisions of the statute and its long-standing interpretation in mind. All that the agreement refers to in relation to taxes is that each party shall pay taxes *assessable* to them (paragraphs 9 and 11 (d)). Under the statute this means that the wife must pay tax on the part of the periodic payments payable as alimony and that the husband must pay tax on the portion payable for child support, the amount thereof having been fixed by the terms of the agreement.

Respectfully submitted,

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APRIL 1961.

APPENDIX

Property Settlement Agreement

Agreement between Ardell Lester, hereinafter called "wife", and Jerry Lester, hereinafter called "husband", dated at Beverly Hills, California, this 16th day of April, 1951.

The parties contract with reference to the following facts:

(a) That husband and wife were married on August 24, 1934, in Los Angeles, California.

(b) That the parties have three children, issue of the marriage of the parties, to wit, Judy Lester, age 13, Joan Lester, age 11, and Jay Lester, age 9.

(c) The parties have separated and are now living separate and apart.

(d) The parties desire by this agreement to settle for all times their respective property rights, interests, duties and obligations with respect to each other, and to arrange by agreement for the making of periodic payments to the wife as and for the maintenance and support for her and the aforesaid children of the parties, in discharge of the husband's legal obligations arising out of, or in connection with the marital and family relationship between the parties, whether or not a divorce or decree of separation may hereafter be granted in favor of either of the parties hereto against the other.

(e) This agreement is made voluntarily by both parties free from duress or influence on the part of the other and each has had independent advice of counsel.

(f) The wife is familiar with the husband's earning capacity and a full disclosure has been made by the parties of all of the property heretofore acquired by either of the parties in the name of the parties or in the name of either of them.

(g) An action for separate maintenance is pending between the wife as plaintiff and the husband as defendant, said action having been instituted in the Superior Court of the State of California in and for the County of Los Angeles, and being entitled, "*Ardell Lester, Plaintiff*, v. *Jerry Lester, et al., Defendants*, Number S.M.D. 8064."

In consideration of the above, and other good and valuable considerations moving one to the other, it is agreed between the parties as follows:

1. The parties agree that they shall live separate and apart and each shall be free from interference, authority or control by the other as fully as if he or she were unmarried, and each may conduct, carry on, and engage in any employment, business, or trade and/or carry on his or her personal affairs in such manner as to him or her shall deem advisable for his or her own sole use and benefit, free from any control, restraint or interference, direct or indirect by the other party, in all respects as if each were unmarried. They agree that they will not molest or compel or seek to compel the other party to cohabit or dwell with him or her by any proceedings for the restoration of conjugal rights or otherwise.

2. Except as herein otherwise expressly provided, each of the parties hereto does hereby release, relinquish, quitclaim and surrender to the other, his or her heirs, executors, administrators, assigns, property and estate, all and every right as the spouse of the other, and any and all present or future claims or demands of every nature on or against the other, or on or against the property of the other, including

but not limited to the right to claim a family allowance upon the death of the other, future support and maintenance, alimony pendente lite and permanent alimony. Each of the parties hereto as the spouse of the other does hereby release, relinquish, quitclaim and surrender all rights or demands in law or equity to any and all property which the other may now own hereunder or hereafter acquire, and all rights to the same at the death of the other, and all rights as the heir of the other, as well as the right to act as administrator or administratrix of the estate of the other by reason of the relationship of husband and wife now existing, or which may exist between them at the time of the death of the other; except that either party may act as the executor or executrix of the Will of the other if so nominated or appointed therein. Each of the parties hereto hereby agrees not to contest any Will now in existence or that may hereafter be made of or by the other party.

3. Except as the same may be subjected to the claims and rights hereinafter provided for the benefit of the wife and the children, henceforth and forever, any property now owned or that may hereafter be acquired by either of the parties hereto by gift, devise, descent, distribution, purchase, exchange or in any other manner whatsoever, including property transferred herein, shall be the sole and separate property of the party acquiring the same; and this agreement shall operate as and is intended as a release, relinquishment, quitclaim and surrender by each of the parties hereto of any rights he or she may have or assert or claim to have in or to any and all such property.

4. (a) Except as may be herein otherwise specifically provided, the wife hereby agrees to hold the husband harmless of and from any and all debts,

liabilities and obligations suffered or incurred by the wife either before or after the date of execution hereof. In the event that any action or proceeding shall be commenced against the husband on account of any such debt, liability or obligation, then and in each such event the wife assumes and agrees to pay all expenses, costs and attorneys' fees suffered or incurred by the husband in the defense of any such action or proceeding; provided, however, that the wife shall have the right at her own cost and expense to provide the husband with counsel for the defense of any such action or proceeding.

(b) The husband hereby agrees to hold the wife harmless of and from all debts, liabilities and obligations heretofore incurred by him up to the date hereof, and/or hereafter suffered or incurred by him. In the event that any action or proceedings shall be commenced against the wife on account of any debt, liability or obligations heretofore suffered or incurred by the husband, or hereafter incurred by the husband, then and in each such event, the husband assumes and agreees to pay all expenses, costs and attorneys' fees suffered or incurred by the wife in the defense of any such action or proceeding; provided, however, that the husband shall have the right at his own cost and expense to provide the wife with counsel for the defense of any such action or proceeding.

(c) In the event that either of the parties hereto is required to pay, disburse, or incur any obligation, cost or expense by reason of the foregoing and as to which obligation, cost or expense said party was to be held harmless, the amount of such obligation, cost or expense shall immediately become due and payable by the other and may be offset and credited against any amounts or other sums due to such indebted party.

5. All of the future earnings and/or accumulations

of the husband or the wife from and after the date of the execution of this agreement shall be and remain the sole and separate property and estate of the party so earning or accumulating the same, and shall not be deemed to be community property at any time whatever, or at all.

6. Each of the parties hereto shall make, execute, deliver and acknowledge unto the other, upon demand and without charge or expense, any instrument that may be necessary or convenient in order to carry out or execute any of the terms of this agreement, or to vest in the respective parties fully and completely, as their own separate property and estate, any property, real or personal, that is hereby vested, or that may be hereafter acquired, by either of them.

Without limiting the generality of the foregoing, it is hereby expressly agreed that each of the parties hereto will make, execute, deliver and acknowledge unto the other, upon demand and without charge or expense, any instrument required by any bank, title company, trust company or insurance company as evidence of the separate character of any property of the respective parties hereto.

7. Upon the effective date of this agreement (as said term is defined in article 11, subdivision (j)), the husband agrees to pay to the wife the sum of Ten Thousand Dollars ($10,000.00). In addition, the husband does hereby assign, transfer and convey to the wife all of his right, title and interest in and to the following property, and it is hereby agreed that henceforth all of the following property shall be the sole and separate property of the wife, to wit:

(a) All of the clothing, furs, personal effects and jewelry of the wife.

(b) That certain 1948 Hudson Sedan, Engine No. 48281996, now registered in the name of the wife.

(c) That certain 1947 Ford Station Wagon, Motor No. 799A1681229.

(d) All of the right, title and interest of the husband in and to the real property which is now the home of the parties, located at 418 Denslow, West Los Angeles, California, legally described as follows:

> All that real property situated in the County of Los Angeles, State of California, described as: Lot 4 in Block 3 of Tract 9924 as per map recorded in Book 1.4, Pages 21-23 of Maps in the office of the Recorder of said County.

(e) All of the furniture, furnishings, household equipment and every personalty of every kind and character now situated at 418 Denslow, West Los Angeles, California.

(f) All insurance policies of any kind or character which the husband or the parties may now own insuring any and all of the property listed in this Article 7 against damage, loss, destruction or theft; and all results and proceeds of or from any such insurance policies; also, all personal liability insurance policies on the automobiles listed in subdivisions (b) and (c) of this Article 7.

(g) Any and all bank accounts standing in the name of the wife.

8. The wife does hereby assign, transfer and convey to the husband all of her right, title and interest in and to the following property, and it is hereby agreed that henceforth all of the following property shall be the sole and separate property of the husband:

(a) All of the clothing, personal effects and jewelry of the husband, wherever the same may be located.

(b) That certain 1949 Cadillac Automobile, now registered in the name of the husband, and located in New York City.

(c) Bank accounts of the parties now in the name of the husband or for his purposes and uses, being a commercial account at the National City Bank & Trust Co. having an approximate balance as of March 1, 1951 of $14,000, and a term savings account at the Franklin Savings Bank and the Union Dime Savings Bank having an approximate balance as of March 1, 1951 of $12,000.

(d) All insurance policies of any kind or character which the husband or the parties may now own, insuring any and all of the property listed in this numbered Article against damage, loss or destruction; and all results and proceeds of or from any such insurance policies.

(e) Life insurance policies identified as follows, and all having been issued by the New York Life Insurance Company:

Policy #17871908 in the sum of $25,000
Policy #18014196 in the sum of $25,000
Policy #18014197 in the sum of $25,000

The foregoing policies are subject, however, to the following terms and conditions:

(i) So long as the husband is required to pay the wife the sums and amounts set forth in Article 11 hereof, but in no event later than January 1, 1954, he will cause the wife to be named and designated as the sole and irrevocable beneficiary to the extent of $20,000 of the proceeds which might be payable pursuant to said policies, or any of them.

(ii) So long as the husband is required pursuant to the terms and provisions of this agreement or by law, to maintain and support all of the children of the parties, he will cause all of the children to be jointly named as the sole and irrevocable beneficiaries to the extent of $30,000 of the proceeds which might be payable pursuant to said policies, or any of them. In the

event that the said obligation of the husband shall cease or terminate as to any of said children, such child may be withdrawn as such designated beneficiary, although the obligation herein set forth shall continue with respect to the other children.

(iii) Husband shall subject to the provisions hereof have the right to deal with said policies in any manner he may determine except that he may not cancel such policies. The husband further agrees that arrangements will be made so that due and timely duplicate notices of all premiums due, and duplicate receipts of all premiums paid with respect to said policies, will be sent to the wife, or as she may direct. In the event the husband fails to pay any such premiums when due, the wife shall have the right to make such payment and to forthwith demand reimbursement in such amount from the husband. The husband agrees upon such demand to immediately reimburse the wife, failing in which the amount so due the wife by reason of such advance shall bear interest at the rate of seven percent (7%) per annum until paid.

(f) Any and all funds which are now the subject of an order issued by the Superior Court in and for the County of Los Angeles in those certain proceedings entitled, "Ardell Lester, Plaintiff, versus Jerry Lester, et al, Defendants, No. S.M.D. 8064", whether or not the same have been turned over pursuant to such order to the Receiver heretofore appointed in such proceedings, and after the payment therefrom of all sums ordered to be paid therefrom, including costs, expenses, receiver's fees, and the like (but exclusive of any attorneys' fees).

(g) Any and all funds held for the account of the husband by National Broadcasting Company, Inc. or any other person, firm, or corporation against

whom process has issued in the proceedings hereinabove referred to.

(h) Any and all other property which is not of sufficient or substantial value so as to materially alter the rights of the wife to claim or assert any rights therein.

9. The wife agrees to execute with the husband separate income tax returns, both federal and state, covering their joint or community income received up to the date of the execution of this agreement. For income received subsequent thereto, the husband and wife shall each file separate returns which may hereafter be filed by them. The husband agrees that he will pay all federal and state income taxes on the income of the husband and wife from the date of the marriage of the parties hereto up to and including the effective date of this agreement. Where such taxes have not been paid, or in the event additional assessments should in the future be levied for income received during said period of time, the husband agrees to hold the wife free and harmless therefrom and to indemnify her against any loss on account thereof. Nothing herein contained, however, shall prevent the husband from contesting and disputing the validity and amount of any claim for income taxes during said period, and the husband shall be entitled to litigate any such claims or demands, whether made against the husband or the wife, or both.

10. The parties do hereby acknowledge that the welfare and best interests of the minor children of the parties hereto are of paramount concern and interest to the parties. The parties hereto acknowledge that each is a fit and proper person to have the care, custody and control of the children but agree that the welfare and interests of the minor children of the parties hereto will best be served by the arrange-

ment in this Article 10 set forth. The foregoing, however, shall be deemed to be a statement of intention and shall not be unnecessarily construed as a bar to the rights herein granted to the husband with respect to the rights of visitation and vacation as hereinafter set forth.

The wife shall have the care, custody and control of the minor children of the parties hereto, subject to the husband's reasonable right of visitation with each and all of the minor children at all reasonable times, either at the home of the wife, or at such other places as the husband may from time to time elect. When the husband shall elect to exercise his right of visitation away from the home of the wife, he shall furnish transportation for the minor children from and to the home of the wife.

Except as permitted in the next following paragraph, neither of the parties shall remove any of the said minor children from the State of California without first securing the written consent of the other party or the order of a Court having jurisdiction in the premises after reasonable notice has been first given to the other party.

The husband shall have the right to have the children, or any of them, stay with him during the summer vacation for a period not to exceed thirty (30) days, provided that suitable arrangements are made for their accommodations and transportation, and provided further, that their normal and usual habits, welfare, health and activity are not unduly disturbed or affected, all, of course, being intended to be governed by the aforesaid premise that the paramount concern and interest of the parties is the welfare and health of said children.

11. The husband agrees to pay the wife for the support and maintenance of herself and the children

of the parties, namely, JUDY LESTER, JOAN LESTER and JAY LESTER, the following amounts commencing with the effective date of this agreement (as said term is hereinafter defined in subdivision (j) of this Article 11):

(a) For the period ending December 31, 1951, a sum equal to 50% of the husband's gross income commencing with the effective date of this agreement, but not in excess of a total sum of $50,000.

(b) For the calendar year immediately following the period set forth in subdivision (a) hereof, a sum equal to 25% of the husband's annual gross income during said period of one year, but not in excess of a total sum of $45,000.

(c) For the calendar year immediately following the period set forth in subdivision (b) hereof, a sum equal to 25% of the husband's annual gross income during said period of one year, but not in excess of a total sum of $45,000.

(d) For each year immediately following the period set forth in subdivision (c) hereof, a sum equal to 20% of husband's annual gross income during each such year, but not in excess of that sum each year which, after the payment of all income taxes assessable upon the wife with respect to the amounts thus paid to the wife shall equal $15,600.

(e) "Gross income" as used in this Article 11, is hereby defined to be all income, as such term is defined by the Internal Revenue Code, actually or constructively received by the husband after the effective date of this agreement. Gross income shall be computed before taking into account deductions of any kind, including but not limited to, agents' commissions, and any form of payroll taxes and/or withholdings and such income shall be computed upon the cash receipts basis, as distinguished from the accrual

method of accounting, except that the last accounting period hereunder shall be computed on the accrual basis. Whenever the gross income thus received shall consist of property instead of money, or property together with money, then such property shall be included in gross income at its fair market value at the time of receipt of such property by the husband, but if such property shall at the time of its receipt have no substantial fair market value, then the appreciation thereon, when realized, shall be included in gross income. If, however, such appreciation is not realized before the termination of the payments, as hereinafter provided, then it is agreed that the husband shall pay the wife, notwithstanding anything herein contained to the contrary, a sum equal to 20% of such appreciation when realized. In the event that husband shall sell or otherwise deal in his interest in any contract or agreement which arises from his personal services or from the use of his likeness or name, or from the sale of any goods, wares, merchandise or services bearing or identified with his likeness or name, then the proceeds from any such sale or dealing shall be deemed to be gross income from his personal services or from the use of his likeness or name. If husband renders his services directly or indirectly to, for or on account of any business, firm, copartnership, joint venture or corporation, in which he owns or controls, directly or indirectly, a substantial amount of the capital stock, or otherwise owns or controls, directly or indirectly, a substantial interest in the same, irrespective of the compensation actually paid to the husband for such services, there shall be included in the husband's gross income for the purposes of this Article 11, either the actual amount paid to husband for such services, or a sum equal to the reasonable value of such services, which-

ever is the greater. With reference to services rendered by the husband in connection with "package deals" (as such term is understood in the radio and television broadcasting industries), it is understood and agreed that for the purposes of this subdivision (e) the husband's gross income therefrom shall be that amount remaining after the deduction from the gross amount paid for such package deal of the following expenses only:

(i) Compensation and salaries to other performing artists and personnel.

(ii) Compensation or royalties paid to writers, directors or producers thereof.

(iii) Such other expenses which would not usually be the obligation of the husband if he were rendering his services directly and not through the conduit or means of a "package deal".

(f) In addition to the payments above provided the husband agrees to pay for any extraordinary and unusual medical and dental expenses and fees incurred with respect to any of the children of the parties so long as they are minors and are not emancipated.

(g) The payments provided for above shall be made as follows:

The portion of the year from the effective date of this agreement until the next January 1st, each of the subsequent full calendar years prior to the date when the husband's obligation to make payment pursuant to this Article 11 ceases, and the period from the end of the last calendar year until the husband's obligation to make payments hereunder ceases, shall each be deemed a separate accounting unit. For example, if the effective date of this agreement should be May 1, 1951, and if the husband and wife should live and the wife should remarry

on July 1, 1953, the separate accounting units shall be as follows:

From May 1, 1951 until December 31, 1951, inclusive;

The calendar year 1952;

The period from January 1, 1953 until June 30, 1953, inclusive.

(h) Payments based on the income received by the husband in the preceding month shall be made by him on or before the 10th day of each month, in accordance with the formula hereinabove set forth. He shall pay as an advance only on account thereof the following weekly amounts, commencing with the end of the first week after the effective date of the agreement:

(i) During the first three accounting units (that is, from the effective date of the agreement to and including December 31, 1951, the calendar year 1952 and the calendar year 1953), the sum of $500.00 weekly.

(ii) Thereafter, $300.00 weekly.

Such payments shall be accompanied by a complete statement showing the sources and amounts of compensation received which is subject to the provisions of this agreement, and reflecting the credit to which the husband is entitled for the weekly payments theretofore made. If such weekly payments exceed the amount due, then husband may suspend subsequent weekly payments to the extent of and until he has recouped the amount of such excess credit.

(i) All payments herein specified shall cease upon the death of the husband or the wife or upon the remarriage of the wife, whichever shall first occur. It is expressly agreed that the wife shall not have any claim against the estate of the husband, should he predecease her, for any sums payable hereunder, except such sums as may have been due and payable to her pursuant to the terms hereof prior to his death. In

the event that any of the children of the parties hereto shall marry, become emancipated, or die, then the payments herein specified shall on the happening of each such event be reduced in a sum equal to one-sixth of the payments which would thereafter otherwise accrue and be payable in accordance with the terms and provisions hereof.

(j) This agreement shall become fully effective upon the execution hereof by the parties hereto. However, the phrase "the effective date of this agreement" as used herein in this Article 11 hereof shall be the day following the obtaining of a final or interlocutory decree of divorce, or decree of separate maintenance, whichever shall first occur, or by one or the other of the parties.

(k) The terms and provisions of this Article 11 insofar as they refer to the amount of the payments to the wife, shall not be modified, amended or altered except by and with the mutual consent of the parties hereto, and each of the parties hereto agrees not to apply or petition to any court having jurisdiction in the premises for a modification or change in the amount of such payments.

12. The parties recognize that the services rendered and to be rendered to the wife by her attorneys in connection with the present differences which have occurred between the parties will consist of three distinct categories of service, namely, the services rendered in connection with: (a) the status and the custody and control of their children; (b) the division of the parties' community property; (c) an amount of support and maintenance payable by the husband to the wife in discharge of his obligation to support and maintain said wife and children. The parties agree that the husband shall pay for the services included in the categories above described under (a)

and (b), but the wife agrees to pay to her attorneys, without reimbursement from the husband, all sums which may become due and payable to them in respect of services rendered and to be rendered in connection with the category above described under (c), that is, the services rendered in connection with an amount of support and maintenance payable by the husband to the wife in discharge of his obligation to support and maintain said wife and children. In full payment of husband's obligations under this Article 12, husband agrees to pay to the wife's attorneys the sum of $500.00, receipt of which sum is hereby deemed acknowledged by the wife and by her said attorneys. Other than is provided for herein and in Article 15, it is specifically understood that the husband shall not be liable to the wife for any attorneys' fees of any kind or nature whatsoever, and the wife does hereby release the husband from any right to claim or demand any costs or attorneys' fees of any kind or nature whatsoever, both with reference to the negotiation and execution of this agreement, as well as with reference to any action or proceeding which she might commence or prosecute against him for divorce or otherwise, and she specifically agrees that in any such action she will not ask for or claim any costs or attorneys' fees against him except as herein specifically excluded.

13. The husband agrees that the wife shall have the right to inspect and examine all of the records, documents and data with respect to his earnings and income which are or may be the subject of his obligations hereunder. The husband agrees to keep the wife advised as to where such records, documents and data are kept and maintained. Such examination may be made on behalf of the wife by her attorney or a Certified Public Accountant, and the information

therein contained shall be kept confidential. Husband shall deliver to the wife if requested by her, copies of income tax returns filed by him during the effective term of this agreement. Notwithstanding anything herein contained to the contrary, it is specifically understood and agreed that the wife shall have no rights of inspection of books and records as in this Article 13 provided during such unit that the husband has paid the wife the maximum amount as hereinbefore provided.

14. It is agreed that in any action or proceeding now pending or hereafter brought by either of the parties hereto for a divorce or for separate maintenance, this property settlement agreement shall be presented to the court for its approval and that there may be incorporated in any interlocutory or final judgment entered in such action, such of the executory terms and provisions hereof as counsel for the wife may deem necessary or advisable.

15. If any action is hereafter instituted by either of the parties to enforce any of the terms and provisions herein contained, exclusive of the action to be brought by wife referred to above in Article 14, then, in addition to all relief which may in said action be granted to the prevailing party the court may fix and assess a reasonable amount as and for attorneys' fees incurred by such prevailing party.

16. This agreement is entered into in the State of California, and shall be construed and interpreted under and in accordance with the laws of the State of California. It is expressly understood and agreed by the parties that should any paragraph, or any provision or portion of this agreement be held to be invalid, illegal or void, then and in such event, the paragraph, provision or portion of this agreement so held to be invalid, illegal or void, shall be deleted

from this instrument, and this instrument shall be read as though such invalid, illegal or void paragraph, provision or portion was never included herein, and the remainder of this agreement, excluding such invalid, illegal or void paragraph, provision or portion shall nevertheless subsist and continue in full force and effect.

IN WITNESS WHEREOF, the parties hereto have signed and executed this agreement the day and year first above written.

(s) Ardell Lester,
ARDELL LESTER, *wife.*

(s) Jerry Lester,
JERRY LESTER, *husband.*

Approved by:

PACHT, TANNENBAUM & ROSS,
By (s) N. JOSEPH ROSS,
Attorneys for Wife.

(s) LOUIS MANDEL,
Attorney for Husband.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

On this 18th day of April, 1951, before me, the undersigned, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared ARDELL LESTER, known to me to be the person whose name is subscribed to the within Instrument, and acknowledged to me that she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(s) GERTRUDE CASTY,
Notary Public in and for said County and State.

STATE OF NEW YORK
County of New York, ss:

On this 16th day of April, 1951, before me, the undersigned, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared JERRY LESTER, known to me to be the person whose name is subscribed to the within Instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(s) MOSES B. SHERR,
Notary Public.

U.S. GOVERNMENT PRINTING OFFICE: 1951

SUPREME COURT OF THE UNITED STATES

No. 376.—October Term, 1960.

Commissioner of Internal Revenue, Petitioner, v. Jerry Lester.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May 22, 1961.]

Mr. Justice Clark delivered the opinion of the Court.

The sole question presented by this suit, in which the Government seeks to recover personal income tax deficiencies, involves the validity of respondent's deductions from his gross income for the taxable years 1951 and 1952 of the whole of his periodic payments during those years to his divorced wife pursuant to a written agreement entered into by them and approved by the divorce court. The Commissioner claims that language in this agreement providing "[i]n the event that any of the [three] children of the parties hereto shall marry, become emancipated, or die, then the payments herein specified shall . . . be reduced in a sum equal to one-sixth of the payments which would thereafter otherwise accrue" sufficiently identifies one-half of the periodic payments as having been "payable for the support" of the taxpayer's minor children under § 22 (k) of the Internal Revenue Code of 1939 and, therefore not deductible by him under § 23 (u) of the Code.[1] The Tax Court approved the Commissioner's dis-

[1] Section 22 (k) of the Internal Revenue Code of 1939, 56 Stat. 816-817, provided in part that

". . . periodic payments . . . received [by the wife] subsequent to [a decree of divorce] . . . in discharge of . . . a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under . . . a written instrument incident to such divorce . . . shall be includible in the gross income of such wife . . . . This subsection shall not apply to that part of any

allowance, 32 T. C. 1156, but the Court of Appeals reversed, 279 F. 2d 354, holding that the agreement did not "fix" with requisite clarity any specific amount or portion of the periodic payments as payable for the support of the children and that all sums paid to the wife under the agreement were, therefore, deductible from respondent's gross income under the alimony provision of § 23 (u). To resolve a conflict among the Courts of Appeals on the question,[2] we granted certiorari. 364 U. S. 890. We have concluded that the Congress intended that, to come within the exception portion of § 22 (k), the agreement providing for the periodic payments must specifically state the amounts or parts thereof allocable to the support of the children. Accordingly, we affirm the judgment of the Court of Appeals.

Prior to 1942, a taxpayer was generally not entitled to deduct from gross income amounts payable to a former spouse as alimony, *Douglas* v. *Willcuts*, 296 U. S. 1 (1935), except in situations in which the divorce decree, the settlement agreement and state law operated as a complete discharge of the liability for support. *Helvering* v. *Fitch*, 309 U. S. 149 (1940). The hearings, Senate debates and the Report of the Ways and Means Committee of the House all indicate that it was the intention of Congress, in enacting § 22 (k) and § 23 (u) of the Code, to eliminate

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such periodic payment *which the terms of the . . . written instrument fix*, in terms of . . . a portion of the payment, as a sum which is payable for the support of minor children of such husband." (Emphasis added.)

Section 23 (u), 56 Stat. 817, stated in pertinent part that there shall be allowed as a deduction

"[i]n the case of a husband described in section 22 (k), amounts includible under section 22 (k) in the gross income of his wife, payment of which is made within the husband's taxable year."

[2] Both *Metcalf* v. *Commissioner*, 271 F. 2d 288 (C. A. 1st Cir. 1959), *Eisinger* v. *Commissioner*, 250 F. 2d 303 (C. A. 9th Cir. 1957), have arrived at conclusions contrary to those of the court below.

the uncertain and inconsistent tax consequences resulting from the many variations in state law. "[T]he amendments are designed to remove the uncertainty as to the tax consequences of payments made to a divorced spouse . . . ." S. Rep. No. 673, Pt. 1, 77th Cong., 1st Sess. 32. They "will produce uniformity in the treatment of amounts paid . . . regardless of variance in the laws of different States . . . ." H. R. Rep. No. 2333, 77th Cong., 2d Sess. 72. In addition, Congress realized that the "increased surtax rates[3] would intensify" the hardship on the husband who, in many cases, "would not have sufficient income left after paying alimony to meet his income tax obligations," H. R. Rep. No. 2333, 77th Cong., 2d Sess. 46, and perhaps also that on the other hand, the wife, generally being in a lower income tax bracket than the husband, could more easily protect herself in the agreement and in the final analysis receive a larger net payment from the husband if he could deduct the gross payment from his income.

The first version of § 22 (k) was proposed by the Senate as an amendment to the Revenue Act of 1941. The sums going to child support were to be includible in the husband's gross income only if the amount thereof was "specifically designated as a sum payable for support of minor children of the spouses." H. R. 5417, 77th Cong., 1st Sess., § 117. The proposed amendment thus drew a distinction between a case in which the amount for child support was "specifically designated" in the agreement, and one in which there was no such designation. In the latter event, "the whole of such amounts are includible in the income of the wife . . . ." S. Rep. No. 673, Pt. 1, 77th Cong., 1st Sess. 35. Action on the

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[3] Sections 22 (k) and 23 (u) were enacted as part of the Revenue Act of 1942 which provided for greatly increased tax revenue to meet the expenses of World War II.

bill was deferred by the conference committee[4] and hearings on the measure were again held the following year. The subsequent Report of the Senate Finance Committee on § 22 (k) carried forward the term "specifically designated," used in the 1941 Report (No. 673), with this observation:

> "If, however, the periodic payments . . . are received by the wife for the support and maintenance of herself and of minor children of the husband without such specific designation of the portion for the support of such children, then the whole of such amounts is includible in the income of the wife as provided in section 22 (k) . . . ." S. Rep. No. 1631, 77th Cong., 2d Sess. 86.

As finally enacted in 1942, the Congress used the word "fix" instead of the term "specifically designated," but the change was explained in the Senate hearings as "a little more streamlined language." Hearings before Senate Committee on Finance on H. R. 7378, 77th Cong., 2d Sess. 48. As the Office of the Legislative Counsel reported to the Senate Committee:

> "If an amount is specified in the decree of divorce attributable to the support of minor children, that amount is not income of the wife . . . . If, however, that amount paid the wife includes the support of children, *but no amount is specified for the support of the children*, the entire amount goes into the income of the wife . . . ." *Ibid.* (Italics supplied.)

This language leaves no room for doubt. The agreement must expressly specify or "fix" a sum certain or percentage of the payment for child support before any of the payment is excluded from the wife's income. The statutory requirement is strict and carefully worded. It does not say that "a sufficiently clear purpose" on the part of the

[4] H. R. Rep. No. 1203, 77th Cong., 1st Sess. 11.

parties is sufficient to shift the tax. It says that the "written instrument" must "fix" that "portion of the payment" which is to go to the support of the children. Otherwise, the wife must pay the tax on the whole payment. We are obliged to enforce this mandate of the Congress.

One of the basic precepts of the income tax law is that "[t]he income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not." *Corliss* v. *Bowers*, 281 U. S. 376, 378 (1930). Under the type of agreement here, the wife is free to spend the monies paid under the agreement as she sees fit. "The power to dispose of income is the equivalent of ownership of it." *Helvering* v. *Horst*, 311 U. S. 112, 118 (1940). Including the entire payments in the wife's gross income under such circumstances, therefore, comports with the underlying philosophy of the Code. And, as we have frequently stated, the Code must be given "as great an internal symmetry and consistency as its words permit." *United States* v. *Olympic Radio & Television*, 349 U. S. 232, 236 (1955).

It does not appear that the Congress was concerned with the perhaps restricted uses of unspecified child-support payments permitted the wife by state law when it made those sums includible within the wife's alimony income. Its concern was with a revenue measure and with the specificity, for income tax purposes, of the amount payable under the terms of the written agreement for support of the children. Therefore, in construing that revenue act, we too are unconcerned with the variant legal obligations, if any, which such an agreement, by construction of its non-specific provisions under local rules, imposes upon the wife to use a certain portion of the payments solely for the support of the children. The Code merely affords the husband a deduction for any por-

tion of such payment not specifically earmarked in the agreement as payable for the support of the children.

As we read § 22 (k), the Congress was in effect giving the husband and wife the power to shift a portion of the tax burden from the wife to the husband by the use of a simple provision in the settlement agreement which fixed the specific portion of the periodic payment made to the wife as payable for the support of the children. Here the agreement does not so specifically provide. On the contrary, it calls merely for the payment of certain monies to the wife for the support of herself and the children. The Commissioner makes much of the fact that the agreement provides that as, if, and when any one of the children married, became emancipated or died the total payment would be reduced by one-sixth, saying that this provision did "fix" one-half (one-sixth multiplied by three, the number of children) of the total payment as payable for the support of the children. However, the agreement also pretermitted the entire payment in the event of the wife's remarriage and it is as consistent to say that this provision had just the opposite effect. It was just such uncertainty in tax consequences that the Congress intended to and, we believe, did eliminate when it said that the child support payments should be "specifically designated" or, as the section finally directed, "fixed." It does not say that "a sufficiently clear purpose" on the part of the parties would satisfy. It says that the written instrument must "fix" that amount or "portion of the payment" which is to go to the support of the children.

The Commissioner contends that administrative interpretation has been consistently to the contrary. It appears, however, that there was such a contrariety of opinion among the Courts of Appeals that the Commissioner was obliged as late as 1959 to issue a Revenue Ruling which stated that the Service would follow the rationale of *Eisinger* v. *Commissioner*, 250 F. 2d 803 (C. A. 9th

Cir. 1957),[5] but that *Weil* v. *Commissioner*, 240 F. 2d 584 (C. A. 2d Cir. 1957),[6] would be followed "in cases involving similar facts and circumstances." Rev. Rul. 59–93, 1959–1 Cum. Bull. 22, 23.

All of these considerations lead to the conclusion that if there is to be certainty in the tax consequences of such agreements the allocations to child support made therein must be "specifically designated" and not left to determination by inference or conjecture. We believe that the Congress has so demanded in § 22 (k). After all, the parties may for tax purposes act as their best interests dictate; provided, as that section requires, their action be clear and specific. Certainly the Congress has required no more and expects no less.

Affirmed.

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[5] The court there approved the rule that "when the settlement agreement, read as a whole, discloses that the parties have earmarked or designated . . . . the payments to be made, one part to be payable for alimony, and another part to be payable for the support of children, with sufficient certainty and specificity to readily determine which is which, without reference to contingencies which may never come in being, then the 'part of any periodic payment' has been fixed 'by the terms of the decree or written instrument' . . . ." 250 F. 2d, at 308.

[6] In that case the agreement provided for reductions only in the event the divorced wife remarried. The court stated that "[t]he fortuitous or incidental mention of a figure in a provision meant to be inoperative, unless some more or less probable future event occurred, will not suffice to shift the tax burden from the wife to the husband." 240 F. 2d, at 588.

SUPREME COURT OF THE UNITED STATES

No. 376.—October Term, 1960.

Commissioner of Internal Revenue, Petitioner, v. Jerry Lester.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May 22, 1961.]

Mr. Justice Douglas, concurring.

While I join the opinion of the Court, I add a few words. In an early income tax case, Mr. Justice Holmes said "Men must turn square corners when they deal with the Government." *Rock Island A. & L. R. Co.* v. *United States*, 254 U. S. 141, 143. The revenue laws have become so complicated and intricate that I think the Government in moving against the citizen should also turn square corners. The Act, 1939 I. R. C. § 22 (k), makes taxable to the husband that part of alimony payments "which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum" payable for support of minor children.

I agree with the Court that this agreement did not "fix" any such amount. To be sure, an amount payable in support of minor children may be inferred from the *proviso* that one-sixth of the payment shall no longer be due, if the children marry, become emancipated, or die. But Congress in enacting this law realized that some portion of alimony taxable to the wife might be used for support of the children, as the opinion of the Court makes clear.

The present agreement makes no specific designation of the portion that is intended for the support of the

children. It is not enough to say that the sum can be computed. Congress drew a clear line when it used the word "fix." Resort to litigation, rather than to Congress, for a change in the law is too often the temptation of government which has a longer purse and more endurance than any taxpayer.